DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 08-6261
Title: John Robertson, Petitioner
v.
United States, ex rel. Wykenna Watson
Docketed: September 11, 2008
Lower Ct: District of Columbia Court of Appeals
Case Nos.: (00-FM-925, 04-FM-1269)
Decision Date: January 24, 2008
Rehearing Denied: June 13, 2008
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Sep 10 2008	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due October 14, 2008)
Oct 14 2008	Waiver of right of respondent Wykenna Watson to respond filed.
Oct 23 2008	DISTRIBUTED for Conference of November 7, 2008.
Nov 10 2008	The motion of petitioner for leave to proceed in forma pauperis is denied. Petitioner is allowed until December 1, 2008, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.
Nov 26 2008	Petitioner complied with order of November 10, 2008.
Dec 4 2008	DISTRIBUTED for Conference of January 9, 2009.
Dec 11 2008	Response Requested . (Due January 12, 2009)
Jan 5 2009	Order extending time to file response to petition to and including February 11, 2009.
Feb 11 2009	Brief of respondent Wykenna Watson in opposition filed. (Printed Brief)
Feb 26 2009	DISTRIBUTED for Conference of March 20, 2009.
Mar 23 2009	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Nov 6 2009	Brief amicus curiae of United States filed.
Nov 17 2009	Supplemental brief of petitioner John Robertson filed. (Distributed)
Nov 18 2009	DISTRIBUTED for Conference of December 4, 2009.
Dec 7 2009	DISTRIBUTED for Conference of December 11, 2009.
Dec 14 2009	Petition for a writ of certiorari GRANTED limited to the following question: Whether an action for criminal contempt in a congressionally created court may constitutionally be brought in the name and pursuant to the power of a private person, rather than in the name and pursuant to the power of the United

	States.
Jan 4 2010	SET FOR ARGUMENT ON Wednesday, March 31, 2010.
Jan 28 2010	Joint appendix filed. (Statement of costs filed)
Jan 28 2010	Brief of petitioner John Robertson filed.
Feb 4 2010	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Feb 12 2010	CIRCULATED.
Mar 1 2010	Brief of respondent Wykenna Watson filed. (Distributed)
Mar 8 2010	Brief amicus curiae of United States filed. (Distributed)
Mar 8 2010	Brief amicus curiae of District of Columbia filed. (Distributed)
Mar 8 2010	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Mar 8 2010	Brief amici curiae of Domestic Violence Legal Empowerment and Appeals Project, et al. filed. (Distributed)
Mar 8 2010	Brief amicus curiae of National Crime Victim Law Institute filed. (Distributed)
Mar 8 2010	Brief amici curiae of Family Law Judges, Practitioners & Scholars filed. (Distributed)
Mar 19 2010	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. and the time is to be divided as follows: 30 minutes for petitioner, 10 minutes for the Solicitor General, and 30 minutes for respondent.
Mar 22 2010	Record received from District of Columbia Court of Appeals. (1 envelope)
Mar 24 2010	Reply of petitioner John Robertson filed. (Distributed)
Mar 31 2010	Argued. For petitioner: Jaclyn S. Frankfurt, Washington, D. C. For respondent: Robert A. Long, Jr., Washington, D. C.; and Elena Kagan, Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

No. 08-6261

IN THE

Supreme Court of the United States

JOHN ROBERTSON,

Petitioner,

v.

UNITED STATES *EX REL.* WYKENNA WATSON,

Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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November 2008

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QUESTION PRESENTED

Whether, consistent with this Court's cases and the Due Process Clause of the Fifth Amendment to the United States Constitution, an action for criminal contempt in a congressionally created court may be brought in the name and pursuant to the power of a private person, rather than in the name and pursuant to the power of the United States.

LIST OF PARTIES

Petitioner John Robertson was the defendant and the appellant below. In Petitioner's view, the criminal contempt action for violation of a civil protection order that is at issue in this case was prosecuted in the name and on the behalf of the United States as the real party-in-interest. In Petitioner's view, Wykenna Watson, although the beneficiary of the underlying civil protection order, was not the real party-in-interest to the criminal contempt prosecution here at issue. Hence, in Petitioner's view, this case should be captioned John Robertson v. United States *ex rel.* Wykenna Watson.

The District of Columbia Court of Appeals, however, ultimately held that Wykenna Watson, rather than the United States, was the real party-in-interest to the criminal contempt prosecution, and that the criminal prosecution thus had been maintained in Wykenna Watson's name and power. The District of Columbia Court of Appeals captioned the case *In re* John Robertson.

The District of Columbia, through the Attorney General for the District of Columbia, maintained that it represented Wykenna Watson in her individual capacity as a private criminal contempt prosecutor. It filed appellate briefs and trial submissions in this putative representational capacity in the proceedings below.

The United States Attorney for the District of Columbia filed an appellate brief at the request of the District of Columbia Court of Appeals.

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REFERENCE TO DECISIONS BELOW

The January 24, 2008, opinion of the District of Columbia Court of Appeals in the consolidated case of *In re John Robertson*, Nos. 00-FM-925, 04-FM-1269, appears at Appendix A to this petition and is reported at *In re Robertson*, 940 A.2d 1050 (D.C. 2008). The June 13, 2008, order of the District of Columbia Court of Appeals denying en banc rehearing appears at Appendix B.

STATEMENT OF JURISDICTION

Petitioner seeks review of the January 24, 2008, decision of the District of Columbia Court of Appeals in *In re Robertson*, 940 A.2d 1050 (D.C. 2008). The Court of Appeals denied en banc review on June 13, 2008. Petitioner filed a petition for a writ of certiorari in this Court, along with a motion to proceed *in forma pauperis* on September 10, 2008. On November 10, 2008, this Court denied the *in forma pauperis* motion, and allowed Petitioner until December 1, 2008, to submit a petition in compliance with Sup. Ct. R. 33.1. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1257(a) & (b).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The at-issue constitutional provision states: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The at-issue statutory provision states: "Violation of any temporary or final order issued under [the Intrafamily Offenses Act] . . . shall be punishable as contempt." D.C. Code § 16-1005(f).

STATEMENT OF THE CASE

I. INTRODUCTION

This case is about whether, under this Court's decisional law and the Due Process Clause of the Fifth Amendment to the United States Constitution, a prosecution for criminal contempt in a congressionally created court must be a public action that is brought in the name and pursuant to the power of the United States, or whether such a criminal prosecution properly may be brought in the name and pursuant to the "power" of a private individual.

In exchange for his entering of a guilty plea to a felony charge for an assault that occurred on March 27, 1999, the United States promised never to prosecute Petitioner John Robertson for his alleged actions of June 26, 1999. Notwithstanding the United States' bargained-for agreement not to prosecute him for his alleged actions of June 26, 1999, Mr. Robertson subsequently was prosecuted under D.C. Code § 16-1005(f), convicted of three counts of criminal contempt, sentenced to three 180-day jail sentences and a five-year term of probation, and ordered to remit fines and restitution to public funds for his alleged behavior of that date.

The District of Columbia Court of Appeals held that Mr. Robertson's criminal contempt prosecution under D.C. Code § 16-1005(f) did not violate the United States' promise never to prosecute him for the events of June 26, 1999. Instead, it held that the criminal prosecution was not brought in the name, interest, and power of the United States, but rather was brought in the name, interest, and power of Wykenna Watson—Mr. Robertson's estranged

girlfriend and the holder of a civil protection order ("CPO") against him. Stated otherwise, the court held that Mr. Robertson's prosecution was a wholly *private*, yet also a wholly *criminal*, cause of action—a cause of action that allowed Ms. Watson to prosecute a "private criminal action" in her own "name and interest." *In re Robertson*, 940 A.2d 1050, 1057-58 (D.C. 2008).

In *United States v. Dixon*, 509 U.S. 688 (1993), however, this Court authoritatively interpreted D.C. Code § 16-1005(f), the very contempt statute at issue in Mr. Robertson's case, and held that it punishes "'a crime in the ordinary sense.'" 509 U.S. at 696 (quoting *Bloom v. Illinois*, 391 U.S. 194, 201 (1968)). And, because the statute punishes "a crime in the ordinary sense," this Court in *Dixon* held that, even though private attorneys had served as prosecutors in that case, the criminal contempt prosecution had been an exercise of the United States' sovereign power that had resulted in a jeopardy bar to the Office of the United States Attorney's subsequent attempt to bring an assault charge stemming from the same event. 509 U.S. at 712.

This Court is the ultimate arbiter of the meaning of a D.C. Code provision. *See Whalen v. United States*, 445 U.S. 684, 687 (1980). The Court of Appeals, therefore, was bound by this Court's holding in *Dixon* that § 16-1005(f) prosecutions are public cases brought in the name and power of the United States. The court simply was not free to interpret the statute as denoting a "private criminal action" that permitted Ms. Watson to bring a prosecution in her own "name and interest." Rather, it was bound to follow *Dixon* and to hold that, because the contempt action had been brought in the

United States' name, the action had violated Mr. Robertson's due process right to receive the benefit of the United States' bargained-for promise never to prosecute him for the events of June 26, 1999. *See Santobello v. New York*, 404 U.S. 257 (1971). For that reason alone, this Court should grant review and reverse.

Moreover, and even if this Court had not already definitively interpreted § 16-1005(f), the lower court could not, consistent with the Due Process Clause, construe the statute as allowing for a prosecution brought in the name and power of a private person. Rather, it is axiomatic that criminal contempt actions are "between the public and the defendant," and are brought in the name and power of the government. *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 445 (1911). A criminal prosecution is an exercise of sovereign power; a private person has no more power to prosecute a criminal action in her own name and power than she would have to enter into treaties with foreign nations or to mint a currency. But, under the lower court's decision, Ms. Watson had the power to deprive Mr. Robertson of his liberty and to force him to pay fines payable to the public fisc in a "private criminal action" that she maintained in "her own name"—a "private criminal action" over which the United States not only had no control or authority, but that could proceed in the face of its explicit promise not to prosecute.

The Court of Appeals grounded this remarkable interpretation of criminal contempt actions in the repudiated notion, voiced in a *dissenting* opinion in *Dixon*, as well as discredited dictum from *In re Debs*, 158 U.S. 564 (1895), that criminal contempt prosecutions are not brought in the name of the

government in order to vindicate the public's interest in enforcement of the criminal law, but rather are private causes of action brought in the names of individual litigants to "'secur[e] to suitors the rights [to] which [a court] has adjudged them entitled.'" 940 A.2d at 1057 (quoting *Dixon*, 509 U.S. at 742 (Blackmun, J., dissenting and concurring in part) (quoting *In re Debs*, 158 U.S. at 596)). But, as this Court long ago recognized, "[c]riminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong." *Bloom*, 391 U.S. at 201 (overruling *In re Debs*). Thus, although a criminal contempt action may arise out of a judicial order entered in a civil action, a criminal contempt action is a separate action "between the public and the defendant." *Gompers*, 221 U.S. at 445. Indeed, in *Gompers* this Court held that criminal contempt actions in congressionally created courts, as opposed to civil contempt actions in such courts, may only be maintained in the United States' name. *Id.*

To be sure, there is a well-established tradition of private attorneys serving as prosecutors to criminal contempt actions. This Court's decisional law is clear, however, that when a private lawyer prosecutes a criminal contempt action in a congressionally created court, such lawyer "represent[s] the United States, not the party that is the beneficiary of the court order allegedly violated." *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 804 (1987). This Court thus has held repeatedly, *see infra* n.11, that criminal contempt prosecutions in such courts, regardless of whether they are litigated by public or private lawyers, are exercises of the United States' sovereign power. For this reason too, the lower court was bound to hold that the D.C. Code § 16-1005(f) prosecution had been

brought in the United States' name and power and, therefore, that the prosecution violated the United States' promise never to prosecute Mr. Robertson for the June 26, 1999, events.

In addition to defeating Mr. Robertson's due process right to enforcement of the plea agreement and defying this Court's precedents, the lower court's invention of a private criminal contempt action has grave consequences for the prosecution of criminal contempts. By insisting that criminal contempt prosecutions seek to punish crime in the ordinary sense, this Court has sought to guarantee that alleged contemnors receive the full panoply of constitutional protections afforded to all criminal defendants.[1] And, as this Court recognized in *Gompers*, courts and creative litigants may not evade or trammel these protections by nominally recasting what in reality are public criminal contempt actions as private civil ones. 221 U.S. at 445-48.

Yet, by ignoring the time-honored meanings of "crime" and "criminal action" and allowing for a private cause of criminal contempt, the Court of Appeals has done just that. Because criminal contempt prosecutions are fundamentally public actions, the public prosecutor always has retained the power to make the discretionary decisions that are vital to the fair and uniform enforcement of the criminal law, even when private lawyers are

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[1] *See, e.g.*, *Dixon*, 509 U.S. at 696 (double jeopardy); *Bloom*, 391 U.S. at 208 (jury trial); *Ex parte Grossman*, 267 U.S. 87, 122 (1925) (presidential pardon); *Cooke v. United States*, 267 U.S. 517, 537 (1925) (right to counsel); *Gompers*, 221 U.S. at 444 (presumption of innocence, proof beyond reasonable doubt, and guarantee against self-incrimination).

prosecuting the case.[2] Under the Court of Appeals' decision, however, the United States has no power to dismiss or in any manner control the private criminal cause of action, no matter how vindictive or overzealous such prosecution might be.

Furthermore, because criminal contempt prosecutions in congressionally created courts fundamentally are public actions maintained in the United States' name, alleged contemnors also are ensured that their basic constitutional rights as criminal defendants will be respected. But, when a private individual brings the criminal contempt prosecution in her own name and power, there is no guarantee that alleged contemnors will receive the safeguards, such as the protection against double jeopardy, the right to the disclosure of exculpatory evidence, or the ability to ask the President for a commutation or pardon, that are guaranteed in criminal contempt actions maintained in the United States' name.

The court's decision constitutes a radical departure from this Court's repeated insistence that criminal contempt actions are public actions brought in the government's name. Because the decision "decide[s] an important federal question in a way

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[2] *See, e.g., United States v. Providence Journal Co.*, 485 U.S. 693 (1988) (holding that private contempt prosecutor in federal court may not petition for writ of certiorari unless United States Solicitor General seeks certiorari review); *Cronan ex rel. State v. Cronan*, 774 A.2d 866, 875 (R.I. 2001) ("[T]he Attorney General may file a *nolle prosequi* and thereby cause a criminal case, including one initiated via a private complaint, to be dismissed at any time.").

that conflicts with relevant decisions of this Court," this Court should grant review. Sup. Ct. R. 10(c).[3]

II. FACTUAL BACKGROUND AND THE PROCEEDINGS BELOW

On March 27, 1999, Petitioner John Robertson allegedly struck his then-girlfriend, Wykenna Watson (App. at 121).[4] Thereafter, the Office of the United States Attorney for the District of Columbia charged Mr. Robertson in the Superior Court of the District of Columbia, Criminal Division, with three counts of felony assault (App. at 56).

Meanwhile, on April 26, 1999, Ms. Watson, pursuant to the District of Columbia Intrafamily Offenses Act, D.C. Code §§ 16-1001 *et seq.*, obtained a civil protection order on the basis of Mr. Robertson's assault of March 27, 1999 (R.20; App. at 6). This CPO, which was issued by a judge sitting in the Superior Court, Family Division, ordered Mr. Robertson to stay away from Ms. Watson and not to assault her (R.20; App. at 6).

At some point in June 1999, the Assistant United States Attorney ("AUSA") prosecuting the felony assault charges extended Mr. Robertson a plea offer

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[3] Petitioner respectfully contends that the lower court's decision is so fundamentally violative of *Dixon* and this Court's other case law that summary reversal is warranted. *See* Sup. Ct. R. 16(1).

[4] Citations to "(App. at *)" refer to a page from Petitioner's appendix in the Court of Appeals. Citations to "(**/**/** Tr. at *)" refer to a date and page from the trial transcripts. Citations to "(R.*)" refer to a page in the record on appeal in Appeal No. 00-FM-925. Citations to "(CR.*)" refer to a page in the record on appeal in Appeal No. 04-FM-1269.

(App. at 61). Shortly thereafter, however, the AUSA informed Mr. Robertson's counsel that he was withdrawing the plea offer due to another incident that had occurred on June 26, 1999, an incident which apparently had involved Mr. Robertson again attacking Ms. Watson. The AUSA further told Mr. Robertson's counsel that he likely would seek an additional indictment relating to the June 26, 1999, incident (App. at 61).

After, however, he investigated the incident, the AUSA decided that the United States might not pursue additional charges with respect to the June event (5/10/00 Tr. at 88; 5/2/00 Tr. at 5; App. at 131). Rather, the AUSA offered Mr. Robertson that if he pled guilty to one count of felony assault with respect to the March 27, 1999, event, the United States would dismiss the remaining two charges and would *promise never to pursue any criminal charges with respect to the events of June 26, 1999* (7/28/00 Tr. at 3-4; App. at 61, 100).

Mr. Robertson accepted this offer and entered a guilty plea (7/28/00 Tr. at 16; App. at 65, 103). The Superior Court judge that presided over the felony case sentenced him to one to three years in prison.

Notwithstanding the promise that Mr. Robertson would not suffer criminal prosecution for the alleged events of June 26, 1999, Ms. Watson, aided by the Attorney General for the District of Columbia,[5] filed a motion under D.C. Code § 16-1005(f) to show cause why Mr. Robertson should not be held in criminal contempt of the CPO entered on April 26, 1999, for

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[5] At all times relevant to the trial court proceedings in this case, the Attorney General was known as the Corporation Counsel for the District of Columbia.

the alleged events of June 26, 1999 (App. at 10). Ms. Watson also filed a civil motion to modify the CPO on the basis of the events of June 26, 1999 (R.30).

Following a consolidated bench trial where an Assistant Attorney General served both as the plaintiff's lawyer and the prosecuting attorney, the Family Court judge adjudicated Mr. Robertson guilty of three counts of criminal contempt for his behavior of June 26, 1999 (5/11/00 Tr. at 33; App. at 190). The judge thereafter entered a Criminal Judgment and Conviction Order that sentenced him to three consecutive 180-day jail terms (execution of one count suspended), imposed a five-year period of probation, ordered him to pay the court costs imposed on all persons convicted of crimes in the Superior Court, and required him to pay fines and criminal restitution to public funds (6/14/00 Tr. at 21; R.144; App. at 23, 208).

With respect to the civil allegations, the Family Court judge found "good cause" to modify and extend the April 26, 1999, CPO on the basis of Mr. Robertson's behavior of June 26, 1999 (App. at 215). Due to this civil finding, the judge extended the CPO and ordered Mr. Robertson to pay civil restitution to Ms. Watson (6/14/00 Tr. at 22-28; R.100; App. at 17, 214).

Mr. Robertson appealed from the Family Court judge's finding of criminal contempt (R.145; App. at 24). In addition, Mr. Robertson filed a collateral motion in the Family Court to vacate his criminal contempt convictions (CR.40; App. at 26).[6] In this

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[6] Mr. Robertson did not appeal or collaterally challenge the trial court's finding of good cause to modify and extend the CPO or the remedial civil relief that the court imposed.

collateral challenge, Mr. Robertson relied, inter alia, on *Dixon* and *Santobello*, and argued that the § 16-1005(f) prosecution had been maintained in the name of the United States and, therefore, that the prosecution had violated the United States' bargained-for promise not to prosecute him for the events of June 26, 1999 (CR.41; CR.40; App. at 37).

In response, the Attorney General argued that the contempt prosecution, although a criminal case, had not been a public prosecution, but rather had been a private cause—maintained in the name and power of Ms. Watson in her "private capacity" (CR.42; App. at 42). The Attorney General thus argued that, although it had resulted in Mr. Robertson suffering criminal punishment for his behavior of June 26, 1999, the prosecution had not violated the United States' plea agreement because the action had been a private one (App. at 42-46).

On August 27, 2004, the Family Court ruled that Mr. Robertson's criminal contempt prosecution had been a "private action" and that Ms. Watson, as a "private petitioner," was "not bound by a plea agreement entered into by government prosecutors" (App. at 50). Mr. Robertson appealed this decision, and the District of Columbia Court of Appeals consolidated this appeal with Mr. Robertson's extant direct appeal (App. at 54).

On appeal, Mr. Robertson again argued that, under the Due Process Clause and this Court's precedents, all criminal contempt prosecutions are maintained pursuant to the power of the government. For its part, the Attorney General again argued that the criminal contempt prosecution

had been brought in the name and interest of Ms. Watson.[7]

At the Court of Appeals' request, the United States Attorney also filed a brief. The United States argued that CPO holders have the right under § 16-1005(f) to pursue criminal actions in "their own names," and that Mr. Robertson's prosecution "was conducted as a private action brought in the name and interest of Watson, not as a public action brought in the name and interest of the United States" (United States Br. 6). The United States thus maintained that the prosecution had not violated its plea agreement.

III. THE DECISION OF THE DISTRICT OF COLUMBIA COURT OF APPEALS

In an opinion issued on January 24, 2008, a three-judge panel of the Court of Appeals affirmed Mr. Robertson's convictions. The court recounted that Mr. Robertson's position was that criminal contempt actions may "only be brought 'in the name of the relevant sovereign,'" in this case "'the United States.'" *In re Robertson*, 940 A.2d at 1057 (quoting

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[7] In the Family Court, the Attorney General acknowledged that, under D.C. Code § 23-101—the statute that governs prosecutions in the District—it could not maintain a criminal contempt action under § 16-1005(f) in the District's name (CR.42; App. at 43). But, the Attorney General argued on appeal that, if the court found that the criminal contempt prosecution had not been brought in Ms. Watson's name, it should find that the action had been maintained in the name of the District. In the appellate brief that it filed, the United States recognized that D.C. Code § 23-101 precludes the Attorney General from bringing a § 16-1005(f) action in the name of the District (United States Br. 20). *See also Goode v. Markley*, 603 F.2d 973, 976 (D.C. Cir. 1979).

Appellant Supp'l Br. 11). The court, however, found that Mr. Robertson's "characterization of the proceeding against him lo[st] sight of the special nature of criminal contempt." *Id.*

Quoting from Justice Blackmun's *dissenting opinion* in *Dixon*, the court stated that "criminal contempt is 'a special situation.'" 940 A.2d at 1057 (quoting *Dixon*, 509 U.S. at 742 (Blackmun, J., dissenting and concurring in part)). And, again quoting Justice Blackmun's dissenting *Dixon* opinion, which in turn had quoted this Court's dictum in *In re Debs*, *supra*, the court stated that a "'court [ ] enforcing obedience to its orders by proceedings for contempt [ ] is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to.'" 940 A.2d at 1057 (quoting 509 U.S. at 742 (Blackmun, J., dissenting and concurring in part) (quoting *In re Debs*, 158 U.S. at 596)). The court held that, under D.C. Code § 16-1005(f), "a criminal contempt proceeding is properly brought in the name of a private person [such as Ms. Watson] . . . rather than in the name of the government," and thus found that Mr. Robertson's criminal contempt prosecution had not violated his plea agreement with the United States. 940 A.2d at 1058.

Mr. Robertson filed a timely rehearing petition with the full Court of Appeals. In an order issued on June 13, 2008, the court denied en banc review.

REASONS FOR GRANTING THE WRIT

I. SUMMARY

Criminal prosecutions are public actions. This Court has held time-and-again that a criminal contempt prosecution is no different. Criminal

contempt is a crime in the ordinary sense and a criminal contempt action in a congressionally created court is like any other criminal action: it is between the United States and the accused. In *Dixon*, this Court interpreted D.C. Code § 16-1005(f), the very statute at issue in this case, as being no different.

The Court of Appeals, however, ignored this Court's authoritative interpretation of § 16-1005(f) and held instead that the statute denotes a "private criminal action" that a private litigant may bring in "her own name and interests." 940 A.2d at 1057-58. As a result of this interpretation, the court found that Mr. Robertson's criminal contempt prosecution had not violated the United States' bargained-for promise never to prosecute him for the events of June 26, 1999. This decision, which the lower court grounded in a *dissent*, as well as on repudiated dictum from *In re Debs*, not only flies in the face of this Court's controlling interpretation of § 16-1005(f), but also of this Court's repeated holdings that criminal contempt prosecutions in congressionally created courts are public actions brought in the name and pursuant to the power of the United States.

In addition, the lower court's creation of a private cause of criminal contempt—a cause of action over which the United States has no control or power—has grave implications for the prosecution of criminal contempt. This Court should grant review to address this important question of federal law and to correct a lower court opinion that simply cannot be reconciled with the relevant decisions of this Court.

II. ARGUMENT

No principle is more basic to our tradition of criminal proceedings or more enduring in its consistency than the definition of crime itself. A "crime," in Blackstone's words, is a "public wrong," "a breach and violation of the public rights and duties, due to the whole community, considered as a community, in it's [sic] social aggregate capacity." William Blackstone, 4 *Commentaries* *5. And, due to the public nature of the harm that it causes, a crime is "punishable by a proceeding brought in the name of the government whose law has been violated." 1 Ronald A. Anderson, *Wharton's Criminal Law & Procedure* § 10 (1957).

By every definition, a "crime" is a "public" wrong; thus, under every conception, a "criminal prosecution" is brought in the government's name, pursuant to the government's power, and on the government's behalf.[8] "[I]n American jurisprudence

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[8] *See, e.g.*, 1 Joel P. Bishop, *Commentaries on the Criminal Law* § 43 (2d ed. 1858) ("Criminal law treats of those wrongs which the government . . . punishes . . . in its own name."); 1 William L. Burdick, *The Law of Crime* § 2 (1946) ("A crime is a public wrong."); William L. Clark & William L. Marshall, *A Treatise on the Law of Crimes* § 1 (3d ed. 1927) ("A crime is any act or omission prohibited by public law . . . and made punishable by the state in a judicial proceeding in its own name."); James E. Grigsby, *The Criminal Law* § 1 (1922) ("Crim[es]. . . are punished by the state in its own name."); 1 Emlin McClain, *A Treatise on the Criminal Law* § 4 (1897) ("A crime is an act or omission punishable as an offense against the state. . . . [I]n case of a crime, the state is deemed the injured party and punishes the wrong-doer . . . in its own name, while in the case of a civil injury, although the state furnishes means for redress, the proceeding is directly in the name . . . of the party injured.").

at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another," *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973), and criminal prosecutions are exercises of governmental, rather than private, power. *See Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 449 (1911) ("The result was as fundamentally erroneous as if in an action of 'A vs. B, for assault and battery,' the judgment entered had been that the defendant be confined in prison for twelve months.").

This Court has held repeatedly that "[c]riminal contempt is a crime in the ordinary sense." *Bloom v. Illinois*, 391 U.S. 194, 201 (1968); *accord Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 826 (1994); *Michaelson v. United States ex rel. Chi., St. Paul, Minneapolis & Omaha Ry. Co.*, 266 U.S. 42, 64 (1924); *Gompers v. United States*, 233 U.S. 604, 610 (1914). Because criminal contempt "is a crime in the ordinary sense," criminal contempt prosecutions likewise are prosecutions in the ordinary sense: such causes of action, although they may arise out of the violation of an order entered in a civil case, "are between the public and the defendant." *Gompers*, 221 U.S. at 445; *see also* 17 Am. Jur. 2d *Contempt* § 145 (2008) ("A criminal contempt proceeding is like any other criminal proceeding, with the public on one side and the alleged contemnor on the other.").

To the extent that any confusion may exist about the public character of criminal contempt actions, such uncertainty likely is the result of the fact that criminal contempt actions sometimes are "prosecuted privately." This Court has held that the federal courts possess the inherent power to hold persons in criminal contempt. *See Young v. United States ex*

rel. Vuitton et Fils S.A., 481 U.S. 787, 796 (1987).[9] As a corollary, this Court has held that the federal courts have the inherent power to appoint private attorneys to prosecute criminal contempt actions. *See id.*

In addition, both the federal court system and the District's local court system have codified the power of private lawyers to prosecute certain criminal contempt actions.[10] For these reasons, there is a well-established tradition in these courts of private attorneys serving as prosecutors in criminal contempt cases. *See, e.g., United States ex rel. Brown v. Lederer*, 140 F.2d 136, 138 (7th Cir. 1944); *In re Jones*, 898 A.2d 916 (D.C. 2006).

Nonetheless, this Court has been unwavering in holding that even when a private lawyer actually

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[9] The Superior Court of the District of Columbia and the District of Columbia Court of Appeals are congressionally created courts, albeit established pursuant to Congress' Article I, rather than its Article III, power. *See* D.C. Code § 11-101(2).

[10] In federal court, the district court must request that the United States Attorney prosecute a contempt action; if the public prosecutor is unable or unwilling, the court then can "appoint another attorney to prosecute." Fed. R. Crim. P. 42(a)(2). The Superior Court Rules Governing Proceedings in the Domestic Violence Unit state that a criminal contempt prosecution under § 16-1005(f) may be prosecuted by the Attorney General, the United States Attorney, an individual CPO holder, or by "an attorney appointed by the Court." Super. Ct. Dom. Viol. R. 12(d). As recounted above, while an Assistant Attorney General served as the prosecutor to Mr. Robertson's contempt action, the Court of Appeals found that the Attorney General had represented Ms. Watson in her private capacity, rather than the United States or, for that matter, the District. 940 A.2d at 1058.

stands in the courtroom well and litigates the case, a criminal contempt action in a congressionally created court is maintained pursuant to the power of the United States.[11] Again, proceedings "for criminal contempt are between the public and the defendant." *Compers*, 221 U.S. at 445; *see also Michaelson*, 266 U.S. at 64 ("[A] proceeding for criminal contempt, unlike that for civil contempt, is between the public and the defendant."). For this reason, although private lawyers may prosecute certain criminal contempt actions in the congressionally created courts, this Court squarely has held that such attorneys "represent the United States, not the party that is the beneficiary of the court order allegedly violated." *Young*, 481 U.S. at 804.[12] At bottom, this

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[11] *See, e.g., United States v. Providence Journal Co.*, 485 U.S. 693, 700 (1988) ("'Private attorneys appointed to prosecute a criminal contempt action *represent the United States.*'") (citation omitted); *Young*, 481 U.S. at 804 ("Private attorneys appointed to prosecute a criminal contempt action represent the United States, not the party that is the beneficiary of the court order allegedly violated.").

[12] In *Young*, this Court found that "[a] private attorney appointed to prosecute a criminal contempt . . . should be as disinterested as a public prosecutor who undertakes such a prosecution." 481 U.S. at 804. It therefore held, pursuant to its supervisory power, that "counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order." *Id.* at 809. In *Green v. United States*, 642 A.2d 1275 (D.C. 1994), the District of Columbia Court of Appeals declined to apply the *Young* requirement of disinterested prosecutors in the context of the Intrafamily Offenses Act. Rather, it held that an interested person can serve as the prosecutor to a D.C. Code § 16-1005(f) action. Petitioner never has challenged the *Green* court's holding that interested attorneys can stand in the courtroom well and

Court's cases are clear in holding that all criminal contempt prosecutions in the congressionally created courts are brought in the name of the United States pursuant to its sovereign power to prosecute crimes.

In *United States v. Dixon*, 509 U.S. 688 (1993), this Court held that criminal contempt actions prosecuted under D.C. Code § 16-1005(f)—the very criminal contempt statute at issue in Mr. Robertson's case—are no different. *Dixon* involved two cases that were consolidated for appeal, *United States v. Dixon* and *United States v. Foster*, both of which were litigated in the District of Columbia's local courts. In *Foster*, Ana Foster—pursuant to the District of Columbia Intrafamily Offenses Act, D.C. Code §§ 16-1001 *et seq.*, the statutory scheme at issue in Mr. Robertson's case—obtained a CPO against her estranged husband, Michael Foster. And, when Foster violated this CPO, Ms. Foster's retained attorneys successfully prosecuted a § 16-1005(f) criminal contempt action against him.

The United States Attorney was not itself involved in the criminal contempt prosecution. 509 U.S. at 692. The United States Attorney, however, later brought charges against Foster for, among other things, an assault arising from the same incident that had supported the criminal contempt prosecution. Although Foster argued that the § 16-1005(f) prosecution had raised a jeopardy bar that precluded the United States Attorney's subsequent

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physically prosecute § 16-1005(f) actions (Appellant Supp'l Br. 3 n.3; Appellant Reply Br. 4 n.3). Rather, he challenges the court's holding in this case that, irrespective of whether a public or private lawyer actually litigates such action, a contempt action under § 16-1005(f) can be brought in the name and interest of a private person.

assault prosecution, the trial court rejected this claim. 509 U.S. at 692-93.

On certiorari review, this Court was presented with the question of whether the Double Jeopardy Clause applies to criminal contempts. In answering that question in the affirmative, this Court squarely held that a criminal contempt in violation of D.C. Code § 16-1005(f) "'is a crime in the ordinary sense.'" 509 U.S. at 696 (quoting *Bloom*, 391 U.S. at 201). And, because the statute denotes a crime in the ordinary sense, the United States was the true party-in-interest to the D.C. Code § 16-1005(f) action, even though "[c]ounsel for Ana Foster . . . prosecuted [it]." 509 U.S. at 692. This Court therefore held it "obvious" that the criminal contempt action had resulted in a jeopardy bar to the assault prosecution. *Id.* at 696.

Of course, there can be no jeopardy bar to a subsequent prosecution unless the antecedent prosecution was brought in the name of the "same sovereign" as was the subsequent one. *See Heath v. Alabama*, 474 U.S. 82, 88 (1985). That is, "the ultimate source of the power under which the respective prosecutions were undertaken" must be the same in both cases. *United States v. Wheeler*, 435 U.S. 313, 320 (1978). The *Foster* case would have come out quite differently if the antecedent contempt prosecution had been maintained in the name and power of Ana Foster. An action maintained pursuant to the "power" of Ms. Foster simply could not have raised a bar to a prosecution maintained pursuant to the power of the United States. *See Wheeler*, 435 U.S. at 318-19.

But, the notion that a criminal action could have been maintained pursuant to Ms. Foster's "power"

simply is nonsensical. Ms. Foster is not a sovereign entity and she was not "the ultimate source of the power under which the [contempt prosecution] w[as] undertaken." *Wheeler*, 435 U.S. at 320. Instead, Foster's criminal contempt prosecution, although prosecuted by his wife's retained attorneys, was maintained pursuant to the United States' power. *See Dixon*, 509 U.S. at 696. It is for this reason that this Court held that the § 16-1005(f) action, although prosecuted by private attorneys, had raised a bar to the United States Attorney's subsequent assault prosecution.[13] *Cf. Gompers*, 221 U.S. at 451 ("If this had been a separate and independent proceeding at law for criminal contempt . . . with the public on one side and the defendants on the other, it could not . . . have been affected by any settlement which the parties to the equity cause made in their private litigation.")

Provisions of the D.C. Code are a species of federal law. *See Whalen v. United States*, 445 U.S. 684, 687 (1980); *see also District of Columbia v. Heller*, 554 U.S. __, 128 S. Ct. 2783, 2853 (2008) (Breyer, J., dissenting) ("This Court has final

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[13] As Justice White stated in concurring with this Court's holding in this respect:

> That the contempt proceeding was brought and prosecuted by a private party in *Foster* is immaterial. For private attorneys appointed to prosecute a criminal contempt action represent the United States, not the party that is the beneficiary of the court order allegedly violated. As we said in *Gompers*, "criminal contempt proceedings arising out of civil litigation are between the public and the defendant."

Dixon, 509 U.S. at 727 n.3 (White, J., concurring and dissenting in part) (citations omitted).

authority (albeit not often used) to definitively interpret District law, which is, after all, simply a species of federal law."). As a result, this Court, rather than the District of Columbia Court of Appeals, is the ultimate arbiter of the meaning of a D.C. Code provision. *See* 445 U.S. at 687-88.

Under this Court's authoritative interpretation of the statute in *Dixon*, Mr. Robertson's D.C. Code § 16-1005(f) prosecution was brought in the name and power of the United States. The criminal contempt prosecution, therefore, violated Mr. Robertson's due process rights because it occurred in derogation of the United States' bargained-for promise that it would not prosecute him for the events of June 26, 1999. *See Santobello*, 404 U.S. at 262.

The Court of Appeals was bound by this Court's interpretation of § 16-1005(f); it was not free to interpret the statute as setting forth a "private criminal action" brought in the "name and interest" of a private person. The fact that the court's interpretation of § 16-1005(f) is flatly counter to this Court's authoritative interpretation of the statute in *Dixon* is reason enough for this Court to grant review and reverse.

Furthermore, and even apart from this Court's authoritative construction, the Court of Appeals' interpretation of § 16-1005(f) as allowing private individuals to bring criminal contempt actions in their own names and interests is unconstitutional. Criminal actions are exercises of sovereign power; as a result, private individuals cannot, consistent with due process, bring criminal actions in their own name. *See Linda R.S.*, 410 U.S. at 619. In recognition of the public nature of all criminal prosecutions in our system of law, this Court has

held repeatedly that criminal contempt actions in the congressionally created courts likewise are not private actions, but rather are exercises of the United States' power. *See, e.g., Michaelson*, 266 U.S. at 67; *Ex parte Grossman*, 267 U.S. 87, 122 (1925).

The fundamental proposition that criminal contempt actions in a congressionally created court may only be brought in the name of the United States dates back at least as far as this Court's 1911 decision in *Gompers v. Buck's Stove & Range Co., supra.* A District of Columbia trial judge had issued an injunction enjoining three union officials, including Samuel Gompers, from disseminating certain statements about the Buck's Stove & Range Company. 221 U.S. at 435-36. When Gompers and the two other union officials violated this injunction, the Buck's Stove & Range Company moved the judge to hold them in contempt. The judge found the officials in contempt of court and sentenced them to sentences of twelve, nine, and six months in jail, respectively. *Id.* at 424.

On certiorari review, this Court was presented with the question of whether the contempt action had been "a case at law for criminal contempt" or "a case in equity for civil contempt." 221 U.S. at 441. This Court began by noting that, in the case of civil contempt actions, the punishment imposed is purely remedial in nature. Remedial relief, which is imposed "for the benefit of the complainant," *id.*, may consist of a monetary payment to the aggrieved judicial order holder, or it may consist of coercive incarceration—that is, that "the defendant stand committed unless and until he performs the affirmative act required by the court's order." *Id.* at 442. Although the defendant in a civil contempt

action thus may suffer imprisonment, "he carries the keys of his prison in his own pocket.' He can end the sentence and discharge himself at any moment by doing what he had previously refused to do." *Id.* (citation omitted).

In contrast, the remedies available upon a finding of criminal contempt are fines and a term of imprisonment "for a definite period." 221 U.S. at 442. Such punishment "is solely punitive." *Id.* at 443. Once a defendant is sentenced to a term of imprisonment for a finding of criminal contempt he, like any other person convicted of a crime, "is furnished no key, and [ ] cannot shorten the term by promising not to repeat the offense." *Id.* at 442. And, rather than serving the remedial goals underlying civil remedies, such punitive fines and incarcerations serve the same interests undergirding the whole of our criminal law: incapacitation, retribution, deterrence, and the vindication of the public's interest in having its laws enforced. *Id.*

This Court stated that this difference in remedies and punishments was crucial in determining whether a contempt action was civil or criminal, because, under our system of law, only the government itself can impose criminal punishment. 221 U.S. at 451. Because civil sanctions are remedial measures imposed for the benefit of the holder of the allegedly violated court order, "[p]roceedings for civil contempt" arising out of the alleged violation of a judicial order entered in a civil case "are between the original parties." *Id.* at 444-45. In contrast, because criminal contempt actions seek punitive sanctions, proceedings for criminal contempt are separate from any civil case and are "between the public and the defendant." *Id.* at 445.

This Court thus held that criminal contempt actions are public actions, "with . . . the government[ ] on one side and the defendant[ ] on the other." *Id.*[14]

With respect to the case before it, however, this Court found that the Buck's Stove & Range Company had acted "not only [as] the nominal, but [as] the actual, party on the one side, with the defendants on the other." 221 U.S. at 445. In other words, the plaintiff, as well as the lower courts, had acted throughout the litigation in such a manner that showed that they "regarded [the case] as a civil proceeding." *Id.* at 447. The punishment imposed, however, which consisted of definite jail terms, was undoubtedly punitive. *Id.* at 449.

This Court held that, because criminal punishments had been imposed in what, in reality, had been a private cause of action, the sentences simply were invalid. 221 U.S. at 449. For this reason, it held that "[t]he criminal sentences imposed in the civil case [ ] should be set aside." *Id.* at 452.

This Court in *Gompers* thus established that

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[14] This Court recognized that in the case of both civil and criminal contempt actions imprisonment may also have an "incidental effect." 221 U.S. at 443. If the case is civil and the punishment is purely remedial, imprisonment nonetheless will have the ancillary effect of vindicating the government's authority. On the other hand, if the proceeding is for criminal contempt and the imprisonment is solely punitive—imposed to vindicate the authority of the government—the holder of the court order "may also derive some incidental benefit from the fact that such punishment tends to prevent a repetition of the disobedience." *Id.* This Court was clear, however, that "such indirect consequences will not change imprisonment which is merely coercive and remedial, into that which is solely punitive in character, or *vice versa*." *Id.*

there simply is no such thing as a criminal contempt prosecution maintained in the name of a private person (or company). And, in the almost one century since its *Gompers* decision, this Court has been unwavering in holding that, regardless of whether such actions arise out of the alleged violation of a judicial order entered in a civil case, and no matter whether a public or a private lawyer prosecutes them, criminal contempt prosecutions are public actions. The Court of Appeals' holding that "the criminal contempt prosecution in this case was conducted as a private action brought in the name and interest of Ms. Watson, not as a public action brought in the name and interest of the United States," 940 A.2d at 1057-58, is absolutely contrary to the manner in which this Court has interpreted contempt actions for the last one-hundred years.

Tellingly, rather than abiding by *Gompers* and the unbroken line of its progeny, the support on which the lower court relied for its interpretation of D.C. Code § 16-1005(f) actions was Justice Blackmun's dissenting opinion in *Dixon* and dictum from the thoroughly repudiated case of *In re Debs*. The court stated: "'[A] court, enforcing obedience to its orders by proceedings for contempt, is not executing the criminal laws of the land, but [is] only securing to suitors the rights [to] which it has adjudged them entitled.'" 940 A.2d at 1057 (quoting *Dixon*, 509 U.S. at 742 (Blackmun, J., concurring and dissenting in part) (quoting *In re Debs*, 158 U.S. at 596)). The court's reliance on these authorities and the principle espoused therein illustrates the abject incorrectness of its decision.

First, and at the risk of stating the obvious, Justice Blackmun's opinion in *Dixon* was a *dissent*.

Writing in *Dixon*, Justice Blackmun disagreed with the majority's holding that, because criminal contempt is a crime in an ordinary sense, the privately prosecuted D.C. Code § 16-1005(f) action implicated the Double Jeopardy Clause. Rather, he wrote that, in his view, criminal contempt actions were a "special situation," brought not to enforce the public's interest in the enforcement of the criminal laws, but rather to secure "'to suitors the rights [a court] has adjudged them entitled to.'" 509 U.S. at 742 (Blackmun, J., concurring and dissenting in part) (quoting *In re Debs*, 158 U.S. at 596).

Justice Blackmun's characterization of criminal contempt, of course, was contrary to the "opinion of the Court," *Dixon*, 509 U.S. at 691, which held that D.C. Code § 16-1005(f) punishes "a crime in the ordinary sense." *Id.* at 696. Considering that Justice Blackmun's dissent is contrary to the controlling "opinion of the Court," it is rather astounding that the Court of Appeals relied on his minority opinion to support its anomalous characterization of this criminal contempt action as a private affair.

Second, in the years since *Gompers* this Court has repudiated the case of *In re Debs*, right down to the very language the lower court quoted and on which Justice Blackmun relied in his *Dixon* opinion. In the 1895 case of *In re Debs*, this Court held that there was no right to a jury trial in a criminal contempt action. The *In re Debs* Court further opined in dictum that a court that seeks to vindicate a court order through "proceedings for [criminal] contempt, is not executing the criminal laws of the land, but [is] only securing to suitors the rights which it has adjudged them entitled to." 158 U.S. at 596.

But, in *Bloom* this Court expressly overruled *In*

re Debs and held that, because criminal contempt is "a crime in the ordinary sense," the jury trial right does in fact attach to serious criminal contempt actions. 391 U.S. at 208. Furthermore, in *Young* this Court renounced the very dictum from *In re Debs* on which the court here relied. This Court in *Young* recognized that one could interpret some of the language from its pre-*Gompers* cases as suggesting that criminal contempt actions are private affairs. 481 U.S. at 800. In rejecting these pre-*Gompers* intimations, this Court, using *In re Debs* as a counterpoint, said:

> Our insistence on the criminal character of contempt prosecutions has been intended to rebut earlier characterizations of such actions as undeserving of the protections normally provided in criminal proceedings. *See, e.g., In re Debs* . . . (no jury trial in criminal contempt action because a court in such a case is "*only securing to suitors the rights which it has adjudged them entitled to*").

Young, 481 U.S. at 800 (emphasis added). In sum, from *Gompers* to *Dixon*, as well as in a myriad of opinions in between, this Court flatly has rejected the notion that criminal contempt actions are private affairs.

Finally, in addition to being contrary to controlling law, the Court of Appeals' decision has grave implications for the conduct of criminal contempt prosecutions. The fact that a criminal contempt action—regardless of whether it arises from a judicial order entered in a civil case, and irrespective of whether it is prosecuted by a public or

a private lawyer—remains, at bottom, the United States' case has important ramifications.

In this case, the Office of the United States Attorney "wield[ed the United States'] formidable criminal enforcement powers," *Young*, 481 U.S. at 810 (plurality opinion), exercised its prosecutorial discretion, and determined that Mr. Robertson, in exchange for a guilty plea with respect to the March 27, 1999, event, should not suffer criminal prosecution for the June 26, 1999, event. Under this Court's controlling interpretations of § 16-1005(f) and criminal contempt generally, Mr. Robertson's subsequent contempt prosecution under § 16-1005(f) undoubtedly violated his due process right to enjoy the benefit of the United States' promise not to prosecute him in any manner for the events of June 26, 1999.

Under the lower court's erroneous interpretation of criminal contempt prosecutions, however, the D.C. Code § 16-1005(f) action did not violate the plea bargain because the prosecution was a private affair. Rather, pursuant to the court's wholly contrarian view of criminal contempt actions, Ms. Watson had the power to override the decision of the United States Attorney and to bring a criminal prosecution in her own name and power—a prosecution which resulted in Mr. Robertson being sentenced to three 180-day jail terms and a five-year term of probation. Bluntly put, the court's interpretation of criminal contempt actions resulted in Mr. Robertson suffering criminal sanctions for the June 26, 1999, event in the face of a bargained-for governmental promise that he would not.

Relatedly, because criminal contempt prosecutions in the congressionally created courts

always have been public cases, the United States' lawyers always have retained the ultimate control over such actions regardless of whether or not a public prosecutor is litigating the case. This control has allowed the public prosecutor to ensure consistent application of the criminal law; furthermore, it has allowed the public prosecutor—who does not labor under the personal grievances that may animate privately brought prosecutions—to preempt, preclude, or mitigate overreaching privately prosecuted criminal cases.[15]

But, under the lower court's construction of criminal contempt actions, the United States Attorney no longer has such control over § 16-1005(f) prosecutions. Rather, because, according to the court, such cases are brought in the name and power of private CPO holders, the United States' lawyers have no ability to step in and preempt or preclude them. As a result, the United States Attorney, who of course is charged with the mandate not just to "win a case," but to ensure "that justice shall be done," *Berger v. United States*, 295 U.S. 78, 88 (1935), has no ability under the court's decision here to vindicate the public's interest, protect the rights of

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[15] *See, e.g., Providence Journal Co.*, 485 U.S. at 701 (holding that private contempt prosecutor in federal court may not petition for writ of certiorari unless Solicitor General seeks certiorari review); *accord State ex rel. Borkowsky v. Rudman*, 274 A.2d 785, 786 (N.H. 1971) (holding that public prosecutor has power to dismiss criminal cases and that this "authority is not limited to prosecutions initiated by public officials[,] but extends also to those originated by a private person"); *Cronan ex rel. State v. Cronan*, 774 A.2d 866, 875 (R.I. 2001) ("[T]he Attorney General may file a *nolle prosequi* and thereby cause a criminal case, including one initiated via a private complaint, to be dismissed.").

the accused, or to have any control over a case that seeks to impose decidedly criminal sanctions, no matter how vindictive or overzealous the private § 16-1005(f) prosecutor may be.

Moreover, the fact that—prior to the decision here—criminal contempt actions in the congressionally created courts have always been brought in the name and power of the United States has meant that an alleged contemnor is entitled to the protection of the constitutional rights that attach in any other criminal case brought in the name of the government. *See supra* n.1; *see generally Mooney v. Holohan*, 294 U.S. 103, 112-13 (1935) (prosecuting attorney is officer of state and hence constrained by Due Process Clause). For example, in an action maintained in the name of the United States, an alleged contemnor is entitled to the production of exculpatory material under *Brady v. Maryland*, 373 U.S. 83 (1963). The *Brady* rule, however, which is grounded in due process and the concept of state action, perforce has no application in private cases. Similarly, an alleged contemnor to an action brought in the name of the United States is protected from successive punishments under the Double Jeopardy Clause. *See Dixon*, 509 U.S. at 712. Although the lower court stated that its opinion was not "inconsistent with *Dixon*," 940 A.2d at 1058, it is impossible to see how this can be true and why, since the criminal contempt action, under the lower court's view, is brought pursuant to the "power" of an individual, an alleged contemnor could not be prosecuted multiple times for the same offense—either by successive private and public prosecutions, or by successive *private* prosecutions brought by different individual beneficiaries of a CPO.

As a final example, because a criminal contempt prosecution in a congressionally created court is brought in the name and power of the United States, a convicted contemnor is entitled to petition the President for a pardon or commutation. *See Ex parte Grossman*, 267 U.S. at 121. Because, however, the lower court now has held that a criminal contempt prosecution under § 16-1005(f) may be brought in the name and power of a private person, a contemnor convicted in such a private action is unable to petition the executive for clemency from the undoubtedly criminal sanctions imposed against him. *See* 267 U.S. at 121 (holding that President's pardon power extends to criminal (but not civil) contempt convictions imposed in federal courts).

In a criminal contempt action maintained in the United States' name and power, an alleged contemnor is entitled to the benefit of bargained-for promises made by government lawyers, is protected from vindictive prosecution, and is ensured that his constitutional rights will be protected. Under the lower court's holding that § 16-1005(f) denotes a private criminal cause of action, however, Mr. Robertson's rights under his plea agreement were completely sidestepped. And, if allowed to stand, the decision will continue to work an end run around this Court's directive that "[p]rosecution [for criminal contempt] must be in conformity with the practice in criminal cases." *Michaelson*, 266 U.S. at 65.

CONCLUSION

Petitioner respectfully requests that this Court grant this petition for a writ of certiorari.

Respectfully submitted.

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(Appendix A)
Reported at *In re Robertson*, 940 A.2d 1050
(D.C. 2008).

DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 00-FM-925, 04-FM-1269.

IN RE JOHN ROBERTSON, APPELLANT.

Appeal from the Superior Court of the District of Columbia
(VSP-785-99)

(Hon. Linda Kay Davis, Trial Judge)

(Argued Jan. 9, 2007 Decided Jan. 24, 2008)

Lee Richard Goebes, Public Defender Service, with whom *James Klein*, Public Defender Service, and *Jaclyn S. Frankfurt*, Public Defender Service, were on the brief, for appellant.

Janice Y. Sheppard, Assistant Attorney General, District of Columba, with whom *Robert J. Spagnoletti*, Attorney General at the time, *Linda Singer*, Acting Attorney General at the time, and *Todd S. Kim*, Solicitor General, and *Rosalyn Calbert Groce*, Deputy Solicitor General, were on the brief, for appellee.

Jeffrey A. Taylor, United States Attorney, and *Roy W. McLeese III*, Assistant United States Attorney, filed a brief at the request of the court.

Joan S. Meier filed a brief for *Amici Curiae* Domestic Violence Legal Empowerment and Appeals Project

(DV LEAP), AYUDA, Break the Cycle, D.C. Coalition Against Domestic Violence, and Women Empowered Against Violence (WEAVE), in support of appellee.

Before FARRELL and REID, *Associate Judges*, and KERN, *Senior Judge*.

REID, *Associate Judge*:

Appellant, John Robertson, appeals from the trial court's denial of his motion to vacate his criminal contempt convictions (Appeal No. 04-FM-1269). He essentially contends that (1) the trial court violated his due process rights by failing to vacate his contempt conviction in light of his plea agreement with the United States Attorney's Office for the District of Columbia ("United States Attorney's Office"); and (2) the trial court erred by failing to find that his trial counsel rendered ineffective assistance of counsel when he did not move to dismiss the criminal contempt proceeding on the basis of the plea agreement.

Mr. Robertson also lodged an earlier appeal challenging his criminal contempt convictions in the trial court (Appeal No. 00-FM-925). After a bench trial, the court had found him guilty of three counts of violating a civil protection order ("CPO") obtained by Ms. Watson. He claims that the trial court erred by (1) misapplying the law of self-defense with respect to one count of his criminal contempt convictions; and (2) rejecting his demand for a jury trial.

Following oral argument relating to these consolidated appeals, we invited the United States Attorney to file a brief pertaining to the appeal concerning the alleged violation of Mr. Robertson's plea agreement, and we requested responses to the

government's brief from Mr. Robertson and Ms. Watson. In addition, we granted the request of several public interest groups to file an amicus brief in support of Ms. Watson.

We hold that the trial court (1) did not violate Mr. Robertson's plea agreement with the United States' Attorney's office by permitting Ms. Watson to enforce her CPO against him, and (2) for that reason, correctly ruled that Mr. Robertson's right to the effective assistance of counsel had not been violated (Appeal No. 04-FM-1269). In addition, we conclude that the trial court correctly rejected Mr. Robertson's claim of self-defense and his demand for a jury trial.

FACTUAL SUMMARY

The record shows that on March 29, 1999, Ms. Watson filed a "Petition and Affidavit For Civil Protection Order" in the Family Division, Domestic Relations Branch, of the Superior Court. She alleged that on March 27, 1999, Mr. Robertson repeatedly pursued and hit her on various parts of her body, including her head and face, with his closed fist; kicked her several times in the head with his heavy work shoes; and threatened to kill her while holding a pocket knife. She suffered a black eye and head injuries. At Ms. Watson's request, the Family Division issued a temporary protection order on March 29, 1999. On April 26, 1999, the Office of Corporation Counsel (now the Office of the Attorney General for the District of Columbia ("OAG")) entered its appearance on behalf of Ms. Watson in the Family Court, and after a hearing that same day, the Domestic Violence Unit of the Superior Court issued a CPO, effective for twelve months, ordering that Mr. Robertson not assault, threaten, harass, or physically abuse Ms. Watson in any manner; stay

away from Ms. Watson's person, home, and workplace; and avoid contacting Ms. Watson in any manner.

On March 29, 1999, Mr. Robertson was charged by complaint in the Superior Court, Criminal Division, with one count of aggravated assault based on the March 27, 1999, incident. On July 8, 1999, a grand jury indicted Mr. Robertson on one count of aggravated assault and two counts of assault with a dangerous weapon. On July 20, 1999, Mr. Robertson entered into a plea agreement with the United States Attorney's Office in which he agreed to plead guilty to one count of felony attempted-aggravated assault related to the March 27, 1999 incident, and in return the United States agreed that it would "not pursue any charges concerning an incident on June 26, [19]99."

On January 28, 2000, Ms. Watson, represented by Corporation Counsel, filed a motion to adjudicate Mr. Robertson in criminal contempt for violations of the CPO, based on incidents between Mr. Robertson and Ms. Watson on June 26 and 27, 1999. She also made a motion to modify and extend the CPO. To support her motion to adjudicate contempt, Ms. Watson submitted an affidavit stating, in part, that (1) on June 26, Mr. Robertson "harassed [her] by repeatedly demanding that [she] drop the criminal charges that were pending against him," and he called her names (Count 1); (2) on June 26, Mr. Robertson "pushed [her] and knocked [her] into a wall" and called her names (Count 2); (3) on June 26/27, around midnight, Mr. Robertson harassed her by repeatedly cursing her (Count 3); (4) on June 26/27, after midnight, Mr. Robertson "physically attacked [her] in the living room," and followed her into the bathroom

where he "repeatedly punched [her] in the head and face" (Count 4); (5) and on June 27, a short time after the living room and bathroom incident, Mr. Robertson "threw drain cleaner at [her]" and caused "lye burns" resulting in her hospitalization in an intensive care unit (Count 5). During a status hearing on April 4, 2000, the parties agreed to extend the CPO, which had been modified by consent on January 31, 2000, until May 30, 2000.

Mr. Robertson filed a demand for a jury trial on April 3, 2000, which Ms. Watson opposed. On May 9, 2000, the Family Court entered an order rejecting Mr. Robertson's jury trial demand and proceeded on May 10 and 11, 2000, with a bench trial to resolve the motion to adjudicate criminal contempt and the motion to modify and extend the CPO. After hearing testimony from Ms. Watson and her mother, Jacqueline Watson, and from defense witness, Vallace Player, and crediting that of Ms. Watson with respect to the first and second counts, the trial judge found beyond a reasonable doubt that Mr. Robertson "harassed Ms. Watson [on June 26, 1999] by making his request that she drop criminal charges and calling her names and . . . by pushing her into a wall [Counts 1 and 2]." The court determined that "[i]n doing those acts he violated willfully the [CPO]." With respect to Counts 3 and 4, the trial court credited the testimony of Ms. Player that all three persons in the house that night "were cursing and behaving in . . . an abominable fashion," and that Ms. Watson was the instigator of the fight because she taunted Mr. Robertson, opened a can of drano over which Mr. Robertson and Ms. Watson fought and bit each other. The court found Mr. Robertson not guilty of Counts 3 and 4. As for the final count, Count 5, "the throwing of the lye," the trial court credited Ms.

Player's testimony. After it was clear that Mr. Robertson "had won the fight convincingly," and "Ms. Watson was down on the ground bleeding badly," Ms. Player asked Mr. Robertson to leave. The trial court found that Mr. Robertson "had ten seconds to get away," but "[i]nstead [Mr. Robertson] stayed there, [ ] had the lye in [his] hand and . . . threw it on [Ms. Watson]." The court determined that Mr. Robertson's assault in throwing the lye at that point was not "any kind of self-defense." Consequently the court adjudged him guilty of Count 5.

Following the trial court's finding on May 11, 2000, that Mr. Robertson was guilty of three counts, the trial judge sentenced him to three consecutive 180-day jail terms, with execution of one of those sentences suspended in favor of five years of probation. The court also ordered Mr. Robertson to pay $10,009.23 in restitution pertaining to medical expenses incurred by Ms. Watson which were paid from the Victims of Crime Compensation Fund. Mr. Robertson filed a timely appeal.

Years later, on November 13, 2003, Mr. Robertson filed a motion, pursuant to D.C. Code § 23-110, to vacate his contempt convictions on the grounds that the contempt proceeding violated his July 28, 2000 plea agreement with the United States.[1] He further argued that his convictions should be vacated because "his trial counsel was ineffective in failing to . . . move to dismiss the [contempt charges], when the government was pursuing criminal charges in violation of a binding plea agreement." Ms. Watson

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[1] Along with the motion to vacate Mr. Robertson filed a request with the Court of Appeals to stay the briefing schedule in the appellate case, pending resolution of the November 13, 2003 motion by the trial court.

filed an opposition to the motion on January 23, 2004. In an order signed on August 27, 2004, the trial court denied Mr. Robertson's motion to vacate the convictions, (1) "find[ing] that the plea agreement . . . is binding only on the government and not on any party seeking to vindicate a right against the respondent arising from the events of June 26, 1999"; and (2) "conclud[ing] that the Office of Corporation Counsel is not acting as a prosecutor but more as an 'aid' to the petitioner," and that "the private practitioner is therefore not bound by a plea agreement entered into by government prosecutors in another case." Mr. Robertson filed a timely appeal.

ANALYSIS

Pertinent Statutory Background: Intrafamily Offenses

In 1982, the Council of the District of Columbia, the District's legislature, determined that it was essential to strengthen the law regarding intrafamily offenses because "[e]xisting remedies have been shown to be inadequate in aiding victims in preventing further abuse." COUNCIL OF THE DISTRICT OF COLUMBIA, COMMITTEE ON THE JUDICIARY, REPORT ON BILL 4-195, THE PROCEEDINGS REGARDING INTRAFAMILY OFFENSES AMENDMENT ACT OF 1982, May 12, 1982, at 2. Consequently, the Council decided "to fill in . . . areas of need in the current District law." *Id.* Measures taken to fill in these areas of need included: (1) "authorizing private rights of action whereby victims of intrafamily offenses may seek protective orders without necessarily going through the Office of the

Corporation Counsel";[2] (2) "expanding coverage of the current law . . ."; and (3) "authorizing civil protection cases to coexist legally along side criminal prosecutions against the same person by providing certain due process protections to the respondent." *Id.* at 2, 3.[3] Thus, the Council enhanced a distinct

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[2] The 1982 amendment added language to D.C. Code § 16-1003(a) specifying that "In the alternative to referral to the Corporation Counsel, a complainant on his or her own initiative may file a petition for civil protection in the Family Division."

[3] One of the provisions added was D.C. Code § 16-1002(c). D.C. Code § 16-1002 provides:

> (a) If, upon the complaint of any person of criminal conduct by another or the arrest of a person charged with criminal conduct, it appears to the United States Attorney for the District of Columbia (hereafter in this subchapter referred to as the "United States attorney") that the conduct involves an intrafamily offense, he shall notify the Director of Social Services. The Director of Social Services may investigate the matter and make such recommendations to the United States attorney as the Director deems appropriate.
>
> (b) The United States attorney may also (1) file a criminal charge based upon the conduct and may consult with the Director of Social Services concerning appropriate recommendations for conditions of release taking into account the intrafamily nature of the offense; or (2) refer the matter to the Attorney General for the filing of a petition for civil protection in the Family Division. Prior to any such referral, the United States attorney shall consult with the Director of Social Services concerning the appropriateness of the referral.

statutory scheme for handling intrafamily offenses and protecting victims against further abuse. The Council created a system under which enforcement of the statutory objectives could be accomplished not only through criminal charges brought by the United States Attorney's Office, but also through the right of a victim or complainant to seek a protective order and, concomitantly, to file a motion for contempt pursuant to D.C. Code § 16-1005 to enforce the CPO. *See Green v. Green*, 642 A.2d 1275, 1279 (D.C. 1994); *In re Peak*, 759 A.2d 612, 620 n.16 (D.C. 2000) ("*Green* arose in the special context of 'an intrafamily proceeding, conducted pursuant to local statutes and rules designed by the Council of the District of Columbia . . . to expedite the application and, if necessary, the enforcement of [Civil Protection Orders] in cases involving domestic violence.' *Green*, [ ] 642 A.2d at 1279"). Our analysis of Mr. Robertson's arguments, as well as those of the United States and the District, proceeds in light of this pertinent statutory background.

Arguments of the Parties and Standard of Review

Mr. Robertson argues that the United States, not Ms. Watson, was "the true party-in-interest to the contempt proceeding"; that under D.C. Code § 16-1005(f), the action against him "was maintained 'in

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(c) The institution of criminal charges by the United States attorney shall be in addition to, and shall not affect the rights of the complainant to seek any other relief under this subchapter. Testimony of the respondent in any civil proceedings under this subchapter and the fruits of that testimony shall be inadmissible as evidence in a criminal trial except in a prosecution for perjury or false statement.

the name of the relevant sovereign, . . . the United States"; and that "there is no such thing in our legal system as a criminal action maintained 'in the name of a private person." He asserts that in "prosecuting [him] for criminal contempt for his alleged behavior on June 26, 1999, the United States breached the plea agreement it entered on July 28, 1999." Further, Mr. Robertson contends that "[his] trial counsel rendered ineffective assistance of counsel by failing to move to dismiss the criminal contempt prosecution as violation of the plea agreement executed on July 28, 1999." Alternatively, Mr. Robertson asserts that his conviction for throwing the lye on Ms. Watson should be vacated because (1) the trial court's denial of his self-defense claim was based on an erroneous application of this jurisdiction's self-defense laws; and (2) the trial court erred in rejecting his demand for a jury trial on the ground that his contempt prosecution constituted a "petty offense."

The United States maintains that "The criminal contempt prosecution in the present case was conducted as a private action brought in the name and interest of [Ms.] Watson, not as a public action brought in the name and interest of the United States or any other governmental entity." And the action was styled and prosecuted as one between Ms. Watson and Mr. Robertson, with the Corporation Counsel's office "acting in a representative capacity on [Ms.] Watson's behalf, not on behalf of the United States government, the District of Columbia government, or any other governmental entity." Furthermore, the government contends that Mr. Robertson's plea agreement with the United States Attorney's Office "could not reasonably be read as a promise that [Ms.] Watson would not bring a private action in her own name and interest seeking an

adjudication of criminal contempt"; nor could it "properly be interpreted as a promise that [Mr.] Robertson would not be subject to prosecution for criminal contempt in the name of the District of Columbia."

The District focuses, in part, on D.C. Code § 16-1002(c) in arguing that "in addition to criminal charges filed by the United States Attorney, Ms. Watson had a right to enforce the CPO through a criminal contempt proceeding and the United States Attorney's Office had no authority to bargain away this right." In addition, the District asserts that "the United States alone agreed not to pursue any charges against Mr. Robertson," and since "[t]he United States and the District of Columbia are separate entities with distinct legal existence [ ]," "the actions of one cannot bind the other."[4]

The question as to whether the terms of the plea agreement between Mr. Robertson and the United States Attorney's Office bind Ms. Watson is a legal issue which we review *de novo*. *Louis v. United States*, 862 A.2d 925, 928 (D.C. 2004) (the court "interprets the terms of the plea agreement *de novo* and . . . reviews the [trial court's] factual findings

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[4] The various *amici curiae* generally stress the importance of private enforcement of the intrafamily offense statute, asserting in part that "it is unlikely that criminal prosecutions can be expected to fill the need for enforcement of all CPOs, given the enormous pressure on the resources of the [United States Attorney's Office] and the high volume of minor CPO violations." *Amici* rely on *Green*, *supra*, indicating that: "The *Green* [c]ourt correctly stated that the Intrafamily Offenses Act 'reflect[s] a determination by the Council that the beneficiary of a CPO should be permitted to enforce that order through an intrafamily proceeding.' 642 A.2d at 1279 and n.7. . . ."

regarding alleged breaches of the plea agreement for clear error.") (quoting *United States v. Gary*, 351 U.S. App. D.C. 380, 383, 291 F.3d 30, 33 (2002) (internal quotation marks omitted)).

Discussion

In our view, the arguments of the United States and the District are more persuasive and more closely reflect the 1982 legislative purpose in granting to victims of intrafamily offenses a central role in the enforcement of the intrafamily offenses statute. As we noted in *Green, supra*,

> [T]he Council intended that considerations supporting a private right of action to seek a CPO apply equally to a private right of action to enforce the CPO through an intrafamily contempt proceeding. *See* D.C. Code § 16-1005(f) ("Violation of any temporary or permanent order issued under this chapter and failure to appear as provided in subsection (a) shall be punishable as contempt.").

642 A.2d at 1279-80 n.7. As the District's legislature acknowledged in 1982, the Office of the Corporation Counsel (now the OAG) lacked the resources to meet the increasing demands for protection under the intrafamily offenses statute. *Id.* Indeed, following oral argument in *Green*, the District filed a motion to supplement the record, which we granted. The supplement revealed that "'Corporation Counsel prosecutes less than 10 percent of the criminal contempt motions brought for violations of civil protection orders, and has only one counsel available for that duty.'" *Id.* Consequently, "to expedite the application and, if necessary, the enforcement of

CPOs in cases involving domestic violence. . . . the Council [determined] that the beneficiary of a CPO should be permitted to enforce that order through an intrafamily contempt proceeding." *Id.* at 1279-80 (footnote omitted). And, D.C. Code § 16-1005(f) and Super. Ct. Dom. V.R. 12(d) authorize an individual to file a motion to adjudicate criminal contempt.[5]

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[6] D.C. Code §§ 16-1005(f) and (g) currently provide:

> (f) Violation of any temporary or final order issued under this subchapter, or violation in the District of Columbia of any valid foreign protection order, as that term is defined in subchapter IV of this chapter, and respondent's failure to appear as required by § 16-1004(b), shall be punishable as contempt. Upon conviction, criminal contempt shall be punished by a fine not exceeding $1,000 or imprisonment for not more than 180 days, or both.
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> (g) Any person who violates any protection order issued under this subchapter, or any person who violates in the District of Columbia any valid foreign protection order, as that term is defined in subchapter IV of this chapter, shall be chargeable with a misdemeanor and upon conviction shall be punished by a fine not exceeding $1,000 or by imprisonment for not more than 180 days, or both.

Super. Ct. Dom. V.R. 12(d) specifies, in pertinent part:

> (d) Motion to adjudicate criminal contempt. A motion requesting that the court order a person to show cause why she/he should not be held in criminal contempt for violation of a temporary protection order or civil protection order may be filed by an individual, Corporation Counsel or an attorney appointed by the Court for that purpose. . . .

Mr. Robertson describes the contempt proceeding brought against him by Ms. Watson as a "criminal action," and asserts that such an action could only be brought "in the name of the relevant sovereign, . . . the United States." Mr. Robertson's characterization of the proceeding against him loses sight of the special nature of criminal contempt. As Justice Blackmun said in *United States v. Dixon*, 509 U.S. 688 (1993), criminal contempt is "a special situation." *Id.* at 742 (Blackmun, J., concurring in part and dissenting in part). "'[Criminal contempt] proceedings are not intended to punish conduct proscribed as harmful by the general criminal laws.'" *Id.* at 742 (quoting *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 799-800 (1987)). That is, "[t]he purpose of contempt is not to punish an offense against the community at large but rather to punish the specific offense of disobeying a court order." *Id.* Furthermore, "'[a] court, enforcing obedience to its orders by proceedings for contempt, is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to.'" *Id.* (quoting *In re Debs*, 158 U.S. 564, 596 (1895)). In short, as the United States maintains, "[t]he criminal contempt prosecution in [this] case was conducted as a private action brought in the name and interest of [Ms.] Watson, not as a public action brought in the name and interest of the United States or any other governmental entity." Thus, the unique statute governing intrafamily offenses, which authorizes an individual to file a motion to adjudicate criminal contempt against one who violates a CPO, does not contravene the general principle that criminal prosecutions are prosecuted in the name of the

sovereign, the United States, or where statutes specify, the District of Columbia.

Consequently, we agree with the United States and the District and we hold that, under the intrafamily offense statute, a criminal contempt proceeding is properly brought in the name of a private person, here Ms. Watson, rather than in the name of the sovereign. *See Green, supra*, 642 A.2d at 1279. This statutory scheme which permits a private person to file a motion to adjudicate criminal contempt does not stand alone in the District. A comparable statutory framework exists in the area of enforcement of child support orders. D.C. Code § 46-225.02(a) (2005) provides that "[t]he Mayor *or any party who has a legal claim to any child support may initiate a criminal contempt action for failure to pay the support* by filing a motion in the civil action in which the child support order was established" (emphasis added). *See In re Warner*, 905 A.2d 233 (D.C. 2006); *Rogers v. Johnson*, 862 A.2d 934 (D.C. 2004).

We cannot agree with Mr. Robertson's arguments that Supreme Court decisions in *Dixon* and *Young, supra*, and our decision in *Peak, supra*, undermine the criminal contempt provision in the District's intrafamily offense statute, which allows a private person to enforce a CPO order. Mr. Robertson contends that *Dixon* "leaves no doubt that D.C. Code § 16-1005(f) actions are maintained 'in the name of the United States." He also asserts that "as . . . *Dixon* [ ] established, a private contempt prosecutor can foreclose the public prosecutor's ability itself to prosecute a criminal case by herself first litigating a private contempt action that raises a jeopardy bar." That *Dixon* was a complicated case is clear from the extensive, multiple opinions written by Justices

Scalia (announcing the judgment of the court), Rehnquist (concurring in part and dissenting in part with two other justices), White (concurring in the judgment in part and dissenting in part with two other justices), Blackmun (concurring in the judgment in part and dissenting in part), and Souter (concurring in the judgment in part and dissenting in part with one other justice). Significantly, as the United States correctly points out, however, "the Court's holding in *Dixon* did not turn on the premise that the prior contempt prosecution was conducted in the name and interest of the United States—rather, it turned on the premise that the identity of the prosecutor in the earlier proceeding was simply irrelevant for Double Jeopardy Clause purposes."[6] In that regard, *Green* is not inconsistent with *Dixon*. In addition, what we said in *Green* is true with respect to Mr. Robertson's case—*Dixon* "simply does not apply to the circumstances presented by this appeal." *Green*, 642 A.2d at 1278 (footnote omitted).

Mr. Robertson's reliance on *Young* is also unavailing. Notably, plaintiff's counsel in *Young* conducted a "sting" operation relating to an investigation of the defendants' alleged violation of a federal court injunction prohibiting infringement of plaintiff's trademark, and plaintiff's counsel also prosecuted the defendants for contempt. *Young*, 481 U.S. at 791-92. The Supreme Court held "that

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[6] Of course, where the "dual sovereignty" principle governs, the identity of the prosecutor is relevant for double jeopardy purposes, *see, e.g., United States v. Wheeler*, 435 U.S. 313 (1978), but even that "concept does not apply . . . in every instance where successive cases are brought by nominally different prosecuting entities." *Id.* at 318. *Dixon* was an instance of the latter.

counsel for a party that is the beneficiary of a court order may not be appointed to undertake contempt prosecutions for alleged violations of that order." *Id.* at 790. Thus, as we declared in *Green*, "the *Young* Court was primarily concerned with the financial and tactical conflicts of interest presented by using plaintiff's counsel to prosecute the criminal contempt charges." *Id.* at 1279 (citing *Young*, *supra*, 481 U.S. at 805-06). "In contrast, the instant criminal contempt arose out of an intrafamily proceeding, conducted pursuant to local statutes and rules designed by the Council of the District of Columbia [ ] to expedite the application and, if necessary, the enforcement of CPOs in cases involving domestic violence." *Id.* (citations omitted).

Peak also is inapplicable to Mr. Robertson's case. There, we distinguished the situation in *Peak* from that in *Green* "which arose in the special context of 'an intrafamily proceeding . . . '"; and we further declared that the *Peak* decision "casts no doubt on the propriety of the contempt procedures authorized in that context by the Superior Court's Intra-Family rules." 759 A.2d at 620 n.16 (citation omitted). In short, the decisions in *Dixon*, *Young*, and *Peak* do not alter our conclusion that the criminal contempt proceeding against Mr. Robertson under the District's intrafamily offense statute was prosecuted in the name of Ms. Watson, not in the name of the United States or the District of Columbia.

Mr. Robertson's Plea Agreement With the United States Attorney's Office

Mr. Robertson essentially argues that Ms. Watson's contempt proceeding against him was barred by his plea agreement with the United States Attorney's Office. "[A] plea agreement is a contract."

United States v. Jones, 313 U.S. App. D.C. 128, 131, 58 F.3d 688, 691 (1995) (citation omitted). "As a consequence, courts will look to principles of contract law to determine whether the plea agreement has been breached." *Id.* (citations omitted); *see also United States v. Ahn*, 343 U.S. App. D.C. 392, 401, 231 F.3d 26, 35 (2000) (citation omitted). The District applies an objective law of contracts and looks to the written language of the parties to determine the reasonable interpretation of the agreement. *See Tillery v. District of Columbia Contract Appeals Bd.*, 912 A.2d 1169, 1176 (D.C. 2006) (citations omitted).

As we have shown, Mr. Robertson starts from the faulty assumption that the criminal contempt proceeding against him was brought in the name of the United States. To interpret Mr. Robertson's plea agreement, we apply contract principles, examining the language of the agreement to determine the intent of the parties. The plea agreement was entered on a form styled "United States vs. John Robertson." The District of Columbia, whose name appeared under that of the United States, was crossed out. Mr. Robertson, his attorney, and an Assistant United States Attorney signed the form. The words "Assistant Corporation Counsel," which appeared under the words "Assistant U.S. Attorney," were crossed out. Ms. Watson's name appeared nowhere on the form. In addition, the pertinent handwritten narrative stated: "In exchange for Mr. Robert[son's] plea of guilty to Attem[pted] Aggravated Assault, the gov't agrees . . . not [to] pursue any charges concerning an incident on 6-26-99." The abbreviated word "gov't" clearly referred to the United States, not Ms. Watson, and certainly not the District of Columbia since that name was deleted. Moreover, only a representative of the

United States and Mr. Robertson and his counsel signed the plea agreement. Under these circumstances, we are satisfied that no objectively reasonable person could understand that Mr. Robertson's plea agreement bound Ms. Watson and precluded her contempt proceeding against Mr. Robertson,[7] or that the agreement bound the District, a distinct, separate governmental entity[8] (whose Corporation Counsel's Office represented Ms. Watson during her prosecution of her motion to adjudicate contempt). *See United States v. Garcia*, 954 F.2d 12, 17 (1st Cir. 1992) ("a defendant's subjective expectations as to how a plea agreement will redound to his benefit are enforceable, if at all, only to the extent that they are objectively reasonable") (citations omitted).

Mr. Robertson's Other Arguments

We dispose of Mr. Robertson's other arguments summarily. In light of our conclusions pertaining to Mr. Robertson's plea agreement, we reject his contention that his trial counsel "rendered [constitutionally] ineffective assistance of counsel by failing to move to dismiss the criminal contempt prosecution as violative of the plea agreement

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[7] That is especially so given § 16-1002(c), which states that "[t]he institution of criminal charges by the United States Attorney shall . . . not affect the rights of the [CPO] complainant to seek any other relief under this subchapter," including—implicitly—a contempt adjudication under § 16-1005(f).

[8] *See Johnson v. District of Columbia*, 853 A.2d 207, 210 n.6 (D.C. 2004) (citing *Randolph v. District of Columbia*, 156 A.2d 686, 688 (D.C. 1959); *District of Columbia v. Ray*, 305 A.2d 531, 534 (D.C. 1973)).

executed on July 28, 1999." Under *Strickland v. Washington*, 466 U.S. 668 (1984), Mr. Robertson's counsel's conduct was reasonable under prevailing professional norms. *See Stewart v. United States*, 881 A.2d 1100, 1113 (D.C. 2005).

Mr. Robertson argues that the "Family Court committed error in denying [his] demand for a jury trial," because, "although D.C. Code § 16-1005(f) sets forth a maximum period of incarceration of 180 days, the $10,000 restitution penalty imposed on [him], viewed in tandem with this maximum period of incarceration and the five-year maximum period of probation, undoubtedly served to remove this case from the category of 'petty' offense." The record shows that in filing her motion to modify and extend civil protection order, apparently simultaneously with her motion to adjudicate contempt, Ms. Watson demanded payment for her medical bills (around $10,000) resulting from the burns caused by Mr. Robertson when he threw lye at her. Because of this demand, which Mr. Robertson interpreted, in part, as an effort to obtain personal injury damages, he argued that he was entitled to a jury trial under both the Sixth and Seventh Amendments to the Constitution. The trial court denied his jury demand.[9]

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[9] There is some confusion in the record as to whether the $10,000 restitution requirement for medical bills (payable to the Victims of Crime Compensation Fund) was imposed as part of Mr. Robertson's sentence, or as part of the modification of the CPO. At the June 14, 2000 hearing where the trial court imposed sentence and extended and modified the CPO, the trial court stated that it was suspending execution of the incarceration penalty "and putting [Mr. Robertson] on a five year period of probation with the condition that you pay $10,000 in restitution." A few minutes

In *Olafisoye v. United States*, 857 A.2d 1078 (D.C. 2004), we reiterated the principle that "while federal and state courts must provide jury trials for all 'serious crimes,' trials for offenses that are regarded as 'petty' do not require the same treatment." *Id.* at 1083 (citing *Duncan v. Louisiana*, 391 U.S. 145, 158 (1968)). Moreover, "[t]he factor that distinguishes a serious offense from a petty offense is the 'maximum authorized period of incarceration.'" *Id.* (citing *Blanton v. City of North Las Vegas*, 489 U.S. 538, 541-42 (1989)). "*Blanton* established a presumption that crimes punishable by incarceration of six months or less were not deemed serious for jury trial purposes." *Id.* (citing *Blanton*, *supra*, at 542-43; *Day v. United States*, 682 A.2d 1125, 1128 (D.C. 1996)). On this record, where the maximum statutory penalty is a fine not exceeding $1,000, or a period of incarceration up to 180 days; and where the $10,000 payment was earmarked as restitution or reimbursement for Ms. Watson's medical expenses paid by the Victims of Crime Compensation Fund, we conclude that Mr. Robertson was not constitutionally entitled to a jury trial; under *Olafisoye* and *Blanton*, *supra*, his offense is classified as "petty" rather than "serious." *Cf. Nebraska v. Clapper*, 732 N.W.2d 657,

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later the trial court "move[d] on to the [CPO]" and there also was a reference to restitution and the $10,000 payment. Before the trial court imposed sentence, counsel for Ms. Watson stated that they had "formally asked for the restitution in the modified and extended [CPO]," but that "whether it be done through the contempt proceeding or through the modification of the [CPO], we do think that a restitution is appropriate [and] that total came to just over $10,000 . . ." Mr. Robertson does not press his Seventh Amendment contention in this court.

662-63 (Neb. 2007) (no violation of Sixth Amendment where court ordered defendant to pay $18,862.72 in restitution to victim for medical expenses; "a judge's factfinding for restitution does not result in a sentence that exceeds a statutory maximum"); *United States v. Milkiewicz*, 470 F.3d 390, 403 n.24 (1st Cir. 2006) ("Although restitution is 'criminal' in many senses, . . . we note that some courts have concluded that restitution is not the sort of 'punishment' to which the Sixth Amendment apples") (citations omitted); *United States v. Leahy*, 438 F.3d 328, 337 (3d Cir. 2006) ("restitution order does not punish a defendant beyond the 'statutory maximum' as that term has evolved in the Supreme Court's Sixth Amendment jurisprudence") (citations omitted). *See also United States v. Nachtigal*, 507 U.S. 1, 5 (1993) (sentence which included five years of probation was not an infringement on liberty that required a jury trial under the Sixth Amendment).

Finally, Mr. Robertson asserts that the trial court "misapplied the law of self-defense." The trial court essentially found that after "Mr. Robertson had won the fight [with Ms. Watson] convincingly, Ms. Watson was down on the ground bleeding badly." At Ms. Player's request, Mr. Robertson left her house, but remained on the premises instead of walking away. The trial court credited Ms. Player's testimony and found that Mr. Robertson "had ten seconds to get away," but remained there with lye in his hands and "threw it on [Ms. Watson]." Case law in this jurisdiction holds that "[w]hen a defendant raises a claim of self defense, the trial court must decide, as a matter of law, whether there is record evidence sufficient to support the claim." *Howard v. United States*, 656 A.2d 1106, 1111 (D.C. 1995). Moreover, the trial court here was the factfinder in adjudicating

Mr. Robertson's self-defense claim, and she applied correct legal standards in rejecting it. "[S]elf-defense may not be claimed by one who deliberately places himself . . . in a position where he . . . has reason to believe his . . . presence . . . would provoke trouble." *Id.* (citations and internal quotation marks omitted). What we said in *Gillis v. United States*, 400 A.2d 311 (D.C. 1979) supports the trial court's rejection of Mr. Robertson's self-defense claim with respect to Count 5 of the charges against him:

> [The] middle ground between the two extremes [of] the right to stand and kill, and the duty to retreat to the wall before killing[,] imposes no duty to retreat. . . . But this middle ground does permit [the fact finder] to consider whether a defendant, if he safely could have avoided further encounter by stepping back or walking away, was actually or apparently in imminent danger of bodily harm. In short, this rule permits the [fact finder] to determine if the defendant acted too hastily, was too quick to pull the trigger. A due regard for the value of human life calls for some degree of restraint before inflicting serious or mortal injury upon another.

Id. at 313. Given the trial court's credibility determination and its factual findings, we see no reason to disturb its rejection of Mr. Robertson's claim to self-defense.

Accordingly, for the foregoing reasons, we affirm the judgments of the trial court in Appeal No. 00-FM-925 and Appeal No. 04-FM-1269.

So ordered.

(Appendix B)

District of Columbia
Court of Appeals

Nos. 00-FM-925 and 04-FM-1269

IN RE: JOHN ROBERTSON,

Appellant.

VSP785-99

BEFORE: Washington, Chief Judge; *Farrell, Ruiz, *Reid, Glickman, Kramer, Fisher, Blackburne-Rigsby, and Thompson, Associate Judges; *Kern, Senior Judge.

ORDER

On consideration of appellant's petition for rehearing or rehearing en banc, the oppositions of appellee and amicus curiae (United States) thereto, the motion of the National Association of Criminal Defense Lawyers, et al., for leave to file amici curiae submission in support of petition, and the motion of Domestic Violence Legal Empowerment and Appeals Project, et al., for leave to file brief as amici curiae in opposition to petition, it is

ORDERED that the motions are granted and the Clerk is directed to file the lodged brief of National Association of Criminal Defense Lawyers, et al., in support of petition and the lodged brief of Domestic Violence Legal Empowerment and Appeals Project, et al., in opposition to petition. It is

FURTHER ORDERED by the merits division* that the petition for rehearing is denied; and it appearing

that no judge of this court has called for a vote on the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

Filed: June 13, 2008

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OPPOSITION BRIEF

Supreme Court, U.S.
FILED
FEB 11 2009
OFFICE OF THE CLERK

No. 08-6261

IN THE

Supreme Court of the United States

JOHN ROBERTSON,
Petitioner,

v.

WYKENNA WATSON,
Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF FOR WYKENNA WATSON IN OPPOSITION

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QUESTION PRESENTED

Whether a plea agreement in which an Assistant United States Attorney agrees on behalf of his office not to bring charges concerning particular acts that both constituted crimes and violated a civil protection order prohibits the beneficiary of that order from invoking her independent right under a local statute to seek criminal contempt convictions.

LIST OF PARTIES

In the view of respondent and the court below, the parties to this case are John Robertson and Wykenna Watson. This case should be captioned accordingly. As explained in this brief and the decision below, petitioner errs in arguing that the United States rather than Ms. Watson is the true party-in-interest. The United States has not participated as a party and does not consider itself a party.

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STATEMENT

In March 1999, respondent Wykenna Watson filed a petition for a civil protection order (CPO) in the Superior Court of the District of Columbia. Pet. App. A, at iii; *see* D.C. Code § 16-1003(a). She alleged that on March 27 she had been assaulted by her former boyfriend, petitioner John Robertson, who threatened to kill her. Pet. App. A, at iii. The Superior Court issued a CPO prohibiting him from, *inter alia*, assaulting, threatening, harassing, abusing, or contacting her. *Id.* at iii–iv. The United States Attorney's Office separately charged him with various crimes in connection with the events of March 27. *Id.* at iv.

Mr. Robertson proceeded to violate the CPO. On June 26, he demanded that Ms. Watson "drop" the pending criminal charges, pushed her into a wall, and called her derogatory names. *Id.* at iv–v. On June 27, he threw drain cleaner on her, causing lye burns that required her hospitalization. *Id.* at v–vi.

In July 1999, he and an Assistant United States Attorney entered a plea agreement to resolve the pending criminal charges relating to the March 27 incident. *Id.* at iv. It was handwritten on a standard form that both his office and the Office of the Attorney General for the District of Columbia (then known as the Office of the Corporation Counsel) used in the Superior Court. C.A. App. 65. Because the Assistant United States Attorney was acting only on behalf of his own office, the signatories struck the words "District of Columbia" in the caption on the pre-printed form (leaving the caption as "United States vs. John Robertson") and the words "Assistant Corporation Counsel" below the signature

line (leaving the words "Assistant U.S. Attorney"). *Id.* Mr. Robertson agreed to plead guilty to attempted aggravated assault. *Id.* The "gov't" agreed to dismiss other charges and "not pursue any charges concerning an incident on 6-26-99." *Id.*

As D.C. Code §§ 16-1002(c) and 16-1005(f) permit, Ms. Watson separately filed her own motion to adjudicate criminal contempt in January 2000. Pet. App. A, at iv. The motion was based on Mr. Robertson's actions on both June 26 and June 27, 1999. *Id.*[1]

After trial in May 2000, the Superior Court found Mr. Robertson guilty on three counts of criminal contempt. *Id.* at v–vi. He was sentenced to 180 days in jail on each count, with execution on one count suspended, and five years of probation. *Id.* at vi. He was also ordered to pay restitution for Ms. Watson's medical bills. *Id.* He appealed. *Id.*

More than three years later, in November 2003, Mr. Robertson moved the Superior Court under D.C. Code § 23-110 to vacate his criminal contempt convictions. Pet. App. A, at vi. He argued that the convictions violated his plea agreement with the United States Attorney's Office and that his trial counsel had been ineffective in not arguing as much. *Id.*

The Superior Court denied the motion. *Id.* at vi–vii. It held "that the plea agreement . . . is binding only on the government and not on any party seek-

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[1] By this point, the Office of the Attorney General had begun representing Ms. Watson. Pet. App. A, at iii. It continues to do so now, as authorized under the Superior Court's local rules. Super. Ct. Domestic Violence Unit R. 9(a)(2).

ing to vindicate a right against [Mr. Robertson] arising from the events of June 26, 1999." *Id.* at vii; C.A. App. 49. He appealed from that order, and the appeal was consolidated with the pending direct appeal from his criminal conviction. Pet. App. A, at ii.

The District of Columbia Court of Appeals affirmed. Based on its precedent and the language and purposes of D.C. Code § 16-1005(f), the court read this local law to confer "a private right of action to enforce the CPO through an intrafamily contempt proceeding." Pet. App. A, at xii–xiii. It rejected Mr. Robertson's argument "that such an action could only be brought 'in the name of the relevant sovereign, . . . the United States," rather than "in the name and interest of [Ms.] Watson." *Id.* at xiv. Noting that Mr. Robertson's argument "loses sight of the special nature of criminal contempt," the court found that this "unique statute . . . does not contravene the general principle that criminal prosecutions are prosecuted in the name of the sovereign" and was consistent with relevant precedent in this Court. *Id.* at xiv–xviii. Because the United States was not a party to the contempt proceeding, the court held that the United States Attorney's Office's plea agreement did not affect the validity of the contempt convictions. *Id.* at xvii–xix.

ARGUMENT

Petitioner agrees that private parties may serve as prosecutors in criminal contempt proceedings, and he explicitly waives the argument that these private prosecutors must be disinterested. Hence, he does not dispute that Ms. Watson could prosecute him for violating the civil protection order that protected her from his assaults. He instead asks this

Court to rule on the abstract issue of whether such a private, interested prosecutor must be taken to represent the sovereign or, as the court below ruled, she could represent herself as authorized by local law.

The petition should be denied for any of three independent reasons. First, petitioner's sole argument why review is warranted is that the decision below is contrary to this Court's case law, but the decision is in fact consistent with this Court's case law. Second, the issue he identifies is not sufficiently important to warrant review. Third, this case is a poor vehicle for considering petitioner's issue.

1. The decision of the court of appeals is consistent with this Court's case law. Thus, petitioner's sole assertion why review is warranted under Supreme Court Rule 10 (Pet. 7–8) is unsupported.

a. Petitioner's primary argument is that this Court has held that a private party may not prosecute criminal contempt in her own name and interest, at least in a "congressionally created court." Pet. i, 17–21. That is incorrect.

On many past occasions, this Court has extended various procedural protections to those charged with criminal contempt, as a consequence either of federal constitutional law or the Court's exercise of supervisory power over the federal courts. *E.g.*, *United States v. Dixon*, 509 U.S. 688, 696 (1993) (protection of Double Jeopardy Clause); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 809 (1987) (protection against prosecution by interested party); *Bloom v. Illinois*, 391 U.S. 194, 201–02 (1968) (right to jury trial); *Offutt v. United States*, 348 U.S. 11, 13–18 (1954) (right to trial before unbiased judge); *Cooke v. United States*, 267 U.S. 517, 536–37 (1925)

(right to counsel, to call witnesses, to be advised of charges, and to respond); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 444 (1911) (presumption of innocence, proof beyond reasonable doubt, right not to testify). In doing so, the Court has at times stated that criminal contempt is "a crime in the ordinary sense." *E.g.*, *Dixon*, 509 U.S. at 696; *Bloom*, 391 U.S. at 201. Seizing on such language, petitioner argues that the Court has held that any prosecutor in a criminal contempt action necessarily represents the sovereign — in this case, the United States. Pet. 16.

That attempt to read isolated language out of context is misguided. The Court was considering the particular questions raised in the cases before it; criminal contempt was "ordinary" in the particular senses relevant in those cases. As it has explained, it did not hold that criminal contempt must be treated as an "ordinary" crime in every sense:

> The fact that we have come to regard criminal contempt as "a crime in the ordinary sense" does not mean that any prosecution of contempt must now be considered an execution of the criminal law in which only the Executive Branch may engage. Our insistence on the criminal character of contempt prosecutions has been intended to rebut earlier characterizations of such actions as undeserving of the protections normally provided in criminal proceedings.

Young, 481 U.S. at 799–800 (citation omitted).

In addition to relying on language misleadingly taken out of context, petitioner argues that the Court actually held in various cases — most notably *Dixon*, *Young*, and *Gompers* — that anyone prosecut-

ing criminal contempt necessarily does so in the sovereign's name and interest, not her own. Pet. 17–26. Again, that is incorrect.

Dixon involved double jeopardy concerns that are not at issue here. The case involved the United States's prosecution of Michael Foster for criminal offenses that had previously been the subject of criminal contempt proceedings prosecuted by attorneys representing his wife, Ana Foster, who held a CPO against him. 509 U.S. at 692–93. As petitioner conceded in the court below, "the *Dixon* plurality did not explicitly discuss whose interests Mrs. Foster's lawyers represented in this criminal contempt proceeding." C.A. Reply Br. 5. Nor was there any implicit holding on who the parties-in-interest are in criminal contempt proceedings, as that issue was not briefed or presented for resolution. *See Webster v. Fall*, 266 U.S. 507, 511 (1925).[2]

Petitioner nonetheless argues that the Court should be taken to have ruled on whether the private attorneys actually represented Mrs. Foster or the United States. His argument has two parts. First, he notes that the Court held that one count in the second prosecution was precluded by the Double

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[2] The United States as petitioner in *Dixon* did not challenge the reasoning of the court below that the "the identity of the prosecutor" was not relevant to the double jeopardy analysis. *United States v. Dixon*, 598 A.2d 724, 732 (D.C. 1991). Instead, as this Court recounted, "the Government presented the sole question '[w]hether the Double Jeopardy Clause bars prosecution of a defendant on substantive criminal charges based upon the same conduct for which he previously has been held in criminal contempt of court.'" *Dixon*, 509 U.S. at 694.

Jeopardy Clause. Pet. 20; *see* 509 U.S. at 712. Second, he contends that the Court would have found no jeopardy bar "unless the antecedent prosecution was brought in the name of the 'same sovereign' as was the subsequent one." Pet. 20.

Whatever the Court may have thought about whom Mrs. Foster's attorneys actually represented, there was no holding on that point. If anything, the Court's statement in describing the proceedings below that "the United States was not represented at trial," 509 U.S. at 691, suggests that it understood Mrs. Foster's attorneys to represent Mrs. Foster.

Moreover, the Court's double jeopardy holding was entirely consistent with that understanding. The Double Jeopardy Clause is not offended by successive prosecutions by different sovereigns. *Heath v. Alabama*, 474 U.S. 82, 88 (1985). "The 'dual sovereignty' concept does not apply, however, in every instance where successive cases are brought by nominally different prosecuting entities." *United States v. Wheeler*, 435 U.S. 313, 318 (1978). The key point for analysis is "not the extent of control exercised by one prosecuting authority over the other but rather the ultimate source of the power under which the respective prosecutions were undertaken." *Id.* at 320; *see Heath*, 474 U.S. at 88–89.

Even though Mrs. Foster's attorneys did not *represent* the United States, their *authority* to prosecute in the District's judiciary came from the District's legislature, and both bodies ultimately draw their authority from the United States. U.S. Const. art. I, § 8, cl.17; D.C. Code § 1-201.01 *et seq.* (Home Rule Act). The *Dixon* Court's holding thus makes perfect sense. The District's legislature could not circum-

vent the Double Jeopardy Clause merely by allowing private parties to represent themselves in seeking criminal contempt. The Court's holding says nothing, however, about whether the District could allow holders of CPOs to represent themselves in criminal contempt proceedings.

Petitioner attempts to blur this distinction by repeatedly referring to a supposed holding by the court below that the criminal contempt prosecution here was taken pursuant to Ms. Watson's "power." *E.g.*, Pet. i, 2, 20. That word appears nowhere in the decision below. The court instead held that this criminal contempt prosecution proceeded in the "name" and "interest" of Ms. Watson rather than those of the United States. Pet. App. A, at xiv. That holding is consistent with *Dixon*.

The decision below is also consistent with *Young*. In that case, the Court made clear that the federal courts may appoint private counsel to prosecute criminal contempt. 481 U.S. at 793–801; *see supra* page 5. In so ruling, the Court noted that "[p]rivate attorneys appointed to prosecute a criminal contempt action represent the United States, not the party that is the beneficiary of the court order allegedly violated." *Id.* at 804. Petitioner asserts that Ms. Watson accordingly must be taken to have represented the United States. Pet. 18.

Petitioner's reliance on that sentence in *Young* is misplaced. He quotes from the decision but omits the word "appointed." Pet. 18. That word was essential; *Young* involved the appointment of private attorneys pursuant to the federal courts' "inherent authority" to pursue contempt. 481 U.S. at 793–801; *see United States v. Providence Journal Co.*, 485 U.S.

693, 700 (1988) (similar). This case, by contrast, does not involve appointed counsel but instead prosecution pursuant to a statute giving the holder of a CPO a private right to pursue criminal contempt. Pet. App. A, at xii. *Young* thus does not speak to this case.

That *Young* is not on point is made all the more clear by the fact that the Court based its decision on its supervisory power over the federal courts, not the Constitution. 481 U.S. at 790, 809 n.21. Because this Court cannot exercise that power in a manner that contravenes statutory provisions, the statute would prevail if it were in conflict with the holding in *Young*. *Thomas v. Arn*, 474 U.S. 140, 148 (1985).

Finally, *Gompers* is also unhelpful to petitioner. In that decision, the Court discussed how to distinguish civil and criminal contempt and recognized that those charged with the latter receive protections such as the presumption of innocence. 221 U.S. at 441–44. Unlike petitioner here, the defendants in *Gompers* had not received such protections, and hence punishment for criminal contempt was improper. *Id.* at 423–24, 444.

In a separate discussion, the Court considered whether the parties had proceeded with the actual understanding that criminal rather than civil contempt was at issue. *Id.* at 444–52. That discussion was relevant for two main reasons. First, the Court recognized that it would be inappropriate to grant criminal relief in a case where such relief had not even been requested. *Id.* at 446, 448–50. Second, the underlying case had settled, such that the Court thought any criminal component could survive only if, as the court below thought, it was a "separate ac-

tion" rather than part of the original case. *Id.* at 445, 451–52.

In considering whether the parties had proceeded with the understanding that criminal charges were at issue, the Court stated that "proceedings at law for criminal contempt are between the public and the defendant," whereas this case had proceeded like a case in equity between private parties. *Id.* at 445. Far from petitioner's characterization (Pet. 25–26), however, this was no holding that any criminal contempt proceeding necessarily must proceed in the sovereign's name and interest. Rather, the Court's observation that criminal contempt proceedings generally proceed in that fashion was just support for its eventual conclusion that "both parties treated this as a proceeding which was a part of the original equity cause." 221 U.S. at 448. By contrast, petitioner knew from the outset that Ms. Watson had explicitly moved for criminal contempt. Pet. App. A, at iv.

Moreover, like *Young*, *Gompers* did not arise in the context of a statute like that at issue, nor did it suggest that any such statute would be unconstitutional. Further, this portion of *Gompers*, like the decision in *Young*, appears to rest on the Supreme Court's supervisory power rather than on any constitutional provisions, and thus its applicability here is suspect. *See supra* page 9. *Gompers*, like the other cases on which petitioner relies, is consistent with the decision below.

b. Petitioner's secondary argument is that this Court has already interpreted the statute in question in a manner inconsistent with how the court below interpreted it. Again, that is incorrect.

Dixon involved the same statutory scheme as that at issue here. Petitioner contends that the Court issued an "authoritative interpretation" that any prosecution authorized by D.C. Code § 16-1005(f) is "brought in the name and power of the United States." Pet. 22. There is no such interpretation of the statute in the *Dixon* decision, nor was any issue of statutory interpretation raised in the briefs or the decision of the court below.[3] Petitioner's argument apparently is based upon the same faulty logic under the Double Jeopardy Clause discussed above. *See supra* pages 7–8.

c. In passing, petitioner also asserts that "private individuals cannot, consistent with due process, bring criminal actions in their own name." Pet. 22. The case he cites simply does not support that proposition. The question before the Court was whether a citizen had Article III standing to challenge an interpretation of state criminal law that made parents of legitimate children subject to prosecution for certain failures, but not those of illegitimate children. *Linda R.S. v. Richard D.*, 410 U.S. 614, 614–16 (1973). In that context, the Court stated: "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the

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[3] After *Dixon*, the court below issued *Green v. Green*, 642 A.2d 1275 (D.C. 1994), which first interpreted the statute at issue to confer a private right to seek criminal contempt. *Id.* at 1278–80 & n.7 (distinguishing *Young*). As the *Dixon* plurality recognized, this Court ordinarily accepts "the construction of a District of Columbia law adopted by the District of Columbia Court of Appeals." 509 U.S. at 701 n.6 (op. of Scalia, J.) (citing *Pernell v. Southall Realty*, 416 U.S. 363, 368–69 (1974)).

prosecution or nonprosecution of another." *Id.* at 619. There was nothing close to a holding that the Due Process Clause forbids legislatures from giving private citizens authority to pursue criminal contempt in their own name and interest.

2. Furthermore, the issue that petitioner seeks to present is of limited importance. Because that issue's importance does not go "beyond the academic or the episodic," review is unwarranted. *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955).

Resolution of this case is unlikely to affect the legal interests of people other than the parties themselves. The essential facts underlying the petition are unusual. The decision below concerns the prosecution of criminal contempt, not of crimes generally. Pet. App. A, at xiv. Criminal contempt proceedings may occur with some frequency, but far rarer are (a) criminal contempt proceedings (b) in Article I or Article III courts, where (c) the prosecutor is someone other than the United States (d) with statutory authority to prosecute in his or her own interest, but (e) the prosecution purportedly violates a plea bargain with the United States. Petitioner tellingly does not assert that the decision below conflicts with that of any federal court of appeals or state court of last resort, or even cite any decision with similar facts. *Cf.* Supreme Court R. 10.

Petitioner nonetheless argues that the decision will have "important ramifications" because those who are subject to criminal contempt proceedings will be unfairly treated if the decision is left standing. Pet. 28–32. This Court has recognized in the context of contempt proceedings, however, that

"criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings." *Hicks v. Feiock*, 485 U.S. 624, 632 (1988). Indeed, in a series of decisions this Court has already ensured that criminal contempt defendants receive protections like those that other criminal defendants receive. *See supra* pages 4–5. And, of course, whoever the prosecutor may be, no punishment can be ordered except by a court exercising sovereign authority and ensuring these protections are provided.

Petitioner does not dispute that he was afforded such protections in this case except to assert that he was denied an essential right because he was prosecuted by a private party acting in her own name and interest. Pet. 29. He has not, however, shown the existence of any right against such a prosecution. Of course, if the court below or another court deprives a criminal defendant of the benefit of actually recognized rights in the future, this Court can exercise review then.[4]

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[4] Petitioner hypothesizes (Pet. 31) that under the reasoning of the court below he might have been denied his rights under *Brady v. Maryland*, 373 U.S. 83 (1963), but he recognized below that the trial court "required [Ms. Watson's counsel] to comply with the strictures of *Brady*." C.A. Br. 19. Citing *Ex parte Grossman*, 267 U.S. 87 (1925), he also questions (Pet. 32) whether he could petition the President to use his "Power to grant . . . Pardons for Offenses against the United States." U.S. Const. art. II, § 2, cl.1. That decision indicates, however, that "the pardon of the President was to operate upon offenses against the United States as distinguished from offenses against the states." 261 U.S. at 113. His criminal contempt

The separate concern that private prosecutors may not administer justice as fairly as public prosecutors (Pet. 29–30) is misplaced. Again, this Court has already approved federal courts' practice of appointing private prosecutors in contempt actions. *Young*, 481 U.S. at 793–801. Although private attorneys appointed in such cases "represent the United States," *id.* at 804, that does not suggest that the United States retains any active role in deciding how — or whether — the prosecution should proceed.[5] To the contrary, the Court suggested that federal courts should turn to private prosecutors only after public prosecutors declined to participate. *Id.* at 801–02. In the absence of any constitutional restraint — and petitioner has shown none — the

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conviction would thus apparently be eligible for pardon, though he does not assert that he has even requested one.

[5] Petitioner contends that the Executive Branch of the United States historically has had authority to dismiss criminal contempt prosecutions in the federal courts even over the objections of private prosecutors. Pet. 29–30 & n.15. That assertion is both unhelpful, as the United States has never objected to this prosecution, and unsupported, as the decision of this Court he cites involved the application of a statute not at issue here. *Providence Journal Co.*, 485 U.S. at 698–708. The view that the "United States' lawyers" should "retain[] ultimate control" over all criminal litigation in Article I courts (Pet. 30) is also inconsistent with the fact that the District of Columbia government, through the Office of the Attorney General, has separate prosecutorial authority in the District's courts. D.C. Code § 23-101. There is no good reason why an Assistant United States Attorney should be able to bargain away the prosecutorial discretion of the District's Attorney General, or conversely why an Assistant Attorney General should be able to bargain away that of the United States Attorney.

District's legislature has authority to decide whether having private prosecutors acting in their own names and interests is good policy.

To the extent the issue of whether private prosecutors can represent themselves or instead must represent the sovereign is important, that importance depends on a related issue that petitioner explicitly waives. This Court held in *Young* "that counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order." 481 U.S. at 809. Petitioner, however, disclaims review based on the notion that Ms. Watson's status as an "interested" party prevented her from prosecuting this matter. Pet. 18 n.12. He also forsook that issue in the court below (C.A. Reply Br. 4 n.3), which thus did not address the issue.

What is left is the far more abstract question of who a criminal contempt prosecutor must be thought to represent. Even if "intellectually interesting," the academic issue is unworthy of review: "this Court does not sit to satisfy a scholarly interest in such issues." *Rice*, 349 U.S. at 74. "[T]he administration of criminal law in matters not affected by Constitutional limitations or a general federal law is a matter peculiarly of local concern. . . . Matters relating to law enforcement in the District are entrusted to the courts of the District." *Fisher v. United States*, 328 U.S. 463, 476 (1946).

3. In any event, for multiple reasons, this case is not a good vehicle for consideration of the issue petitioner seeks to present.

a. First, his argument depends on an unreasonable interpretation of the plea agreement at issue.

He asserts that it purported to bind everyone with authority to prosecute in the name and the interest of the United States, including in his view Ms. Watson. The face of the agreement indicates otherwise.

The plea agreement referred to the "gov't." C.A. App. 65. As the court below properly recognized, "Ms. Watson's name appeared nowhere on the form." Pet. App. A, at xviii. "[N]o objectively reasonable person could understand that Mr. Robertson's plea agreement bound Ms. Watson and precluded her contempt proceeding against Mr. Robertson . . . ." *Id.* at xix.

Even assuming the word "gov't" might be read to mean everyone with prosecutorial authority ultimately deriving from the United States, other portions of the plea agreement make that interpretation impossible. By crossing out the words "District of Columbia" and "Assistant Corporation Counsel" to leave "United States" and "Assistant U.S. Attorney," the signatories made plain that the plea agreement did not bind the District of Columbia. C.A. App. 65; Pet. App. A, at xviii–xix. Although the United States and the District of Columbia are distinct legal entities with separate prosecutorial authority, D.C. Code § 23-101, the government of the District ultimately derives its authority from the United States. U.S. Const. art. I, § 8, cl.17; D.C. Code § 1-201.01 *et seq.* The plea agreement is thus naturally read to include a promise on behalf of federal prosecutors, not everyone with prosecutorial authority ultimately deriving from the United States.

b. Second, the plea agreement was not raised during petitioner's criminal contempt trial, only in a later motion to vacate the convictions. Pet. App. A,

at vi. Given this waiver, petitioner would not merit any relief from this Court merely on a showing that the prosecution violated the plea agreement. In his direct appeal from his criminal convictions, he should be required to show that the failure to dismiss the prosecution based upon the plea agreement was plain error. *See In re Sealed Case*, 356 F.3d 313, 316–17 (D.C. Cir. 2004) (citing cases); *United States v. Olano*, 507 U.S. 725, 732 (1993).[6] Alternatively, in his consolidated appeal from the denial of his collateral attack on his convictions under D.C. Code § 23-110, he is required to show "cause" for his failure to raise the asserted error earlier and prejudice from that error. *Head v. United States*, 489 A.2d 450, 451 (D.C. 1985). Such "cause" may include ineffective assistance of trial counsel. *McCrimmon v. United States*, 853 A.2d 154, 159 (D.C. 2004).

Petitioner cannot make either showing. For the reasons above, it was not error, let alone plain error, for the trial court not to dismiss the criminal contempt charges based on a plea agreement that was inapplicable and that petitioner failed even to mention. Nor has he shown any cause for that failure or any error by trial counsel "so serious that counsel was not functioning as the 'counsel' guaranteed the

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[6] The Court has heard oral argument in *Puckett v. United States*, No. 07-9712, on the question "[w]hether a forfeited claim that the government breached a plea agreement is subject to the plain-error standard of Rule 52(b) of the Federal Rules of Criminal Procedure." The Court can readily conclude that this petition should be denied without waiting for *Puckett* to be decided.

defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

c. Third, on a related note, petitioner never sought relief in the case in which he entered the plea agreement — that relating to his aggravated assault on March 27, 1999 — as he should have done. When a defendant alleges that the government has breached a plea agreement, the sentencing court may consider whether there is a breach and what any remedy should be. *Santobello v. New York*, 404 U.S. 257, 262–63 (1971). Petitioner argued below that the proper remedy for a breach would be in the nature of specific performance — an order vacating convictions following a prosecution that, in his view, never should have begun (C.A. Br. 35–36) — but "*Santobello* expressly declined to hold that the Constitution compels specific performance of a broken prosecutorial promise as the remedy for such a plea." *Mabry v. Johnson*, 467 U.S. 504, 510 n.11 (1984). Here, relief in the nature he recommends would interfere with Ms. Watson's independent right under local law to pursue criminal contempt, and specific performance is disfavored when it would undermine third-party interests. Restatement (Second) of Contracts § 364 (1981).

Withdrawal of the guilty plea that followed the plea agreement would have been more appropriate relief. To the extent that relief would not aid him now because he has completed his sentence following that plea, he is to blame given that he waited more than three years after his criminal contempt convictions before even raising the possibility that they violated the plea agreement. Pet. App. A, at vi.

d. Fourth, because petitioner relied below on his mistaken argument that this Court's decisions required that his convictions be vacated, he did not discuss key issues in any meaningful depth. He did not discuss whether as a matter of statutory interpretation D.C. Code § 16-1005(f) should be read to authorize private parties to bring criminal contempt actions in their own names and interests. Nor did he discuss whether such a statute is inconsistent with the Due Process Clause. The court below thus did not address these issues, leaving this Court in a poor position to do so in the first instance. *See Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 168–69 (2004).

e. Fifth, petitioner was convicted on counts relating to incidents on both June 26 and June 27, 1999, but the plea agreement on its face covers only June 26. Pet. App. A, at iv–v. Before the court below, he nonetheless argued that the plea agreement justified reversal of all his criminal contempt convictions based on the parol evidence that an Assistant United States Attorney in discussing the agreement later referred to an "incident . . . approximately on June 26th." C.A. Br. 17–18 & n.25, 48. Whether or not he is correct on that point, the need to resolve it is another reason why this case is a poor vehicle for consideration of petitioner's issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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FEBRUARY 2009

AMICUS CURIAE BRIEF

144

(2)

Supreme Court, U.S.
FILED
NOV 6 - 2009
OFFICE OF THE CLERK

No. 08-6261

In the Supreme Court of the United States

JOHN ROBERTSON, PETITIONER

v.

UNITED STATES, EX REL. WYKENNA WATSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Due Process Clause of the Fifth Amendment requires that the beneficiary of a civil protective order, when pursuing a private right of action under District of Columbia law for criminal contempt of the order, be understood to bring the action in the name and under the authority of the United States.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to this Court's invitation to the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. On March 29, 1999, respondent filed a petition for a civil protection order (CPO) in the Family Division of the Superior Court of the District of Columbia. She alleged that two days earlier, on March 27, 1999, petitioner, who was her former boyfriend, had assaulted her. On March 29, the court issued a temporary protection order. On April 26, 1999, the Office of the Attorney General for the District of Columbia (OAG) entered an appearance on behalf of respondent. After a hearing that day, the court issued a CPO, effective for one year, that

prohibited petitioner from assaulting, threatening, harassing or contacting respondent. Pet. App. A3-A4.

2. At the same time that respondent pursued a CPO, the United States Attorney's Office for the District of Columbia (USAO) independently pursued criminal charges stemming from the March 27 incident. On March 29, 1999, petitioner was charged by complaint in the Criminal Division of the Superior Court of the District of Columbia. Pet. App. A4. While those charges were pending, on June 26, 1999, petitioner allegedly violated the CPO by asking respondent to drop the criminal charges and verbally and physically abusing her. *Id.* at A4-A6. The USAO did not amend the complaint to add any charges stemming from the June 26 incident. On July 8, 1999, a grand jury indicted petitioner on one count of aggravated assault and two counts of assault with a deadly weapon for the March 27 incident. *Id.* at A4.

On July 20, 1999, petitioner entered into a plea agreement with the USAO to resolve the pending criminal charges. App., *infra*, 1a. The agreement was handwritten on a one-page standard plea agreement form that both the USAO and the OAG (then called the Office of Corporation Counsel) use in the Superior Court. Because the printed form is designed for use by both offices, it lists the "United States" and the "District of Columbia" in the case caption. *Ibid.* It also includes a signature line at the bottom for an "Assistant U.S. Attorney or [an] Assistant Corporation Counsel." *Ibid.*

In this case, the Assistant United States Attorney (AUSA) handling the matter crossed through "District of Columbia" in the caption, so that it read only "United States vs. John Robertson." App., *infra*, 1a. The AUSA also crossed through "Assistant Corporation Counsel" in

his signature line, so that it read only "Assistant U.S. Attorney." *Ibid.* The AUSA wrote at the top of the form: "In exchange for Mr. Robertson's plea of guilty to Attempted Aggravated Assault, gov't agrees to" dismiss the remaining charges and "not pursue any charges concerning an incident on 6-26-99." *Ibid.* Petitioner, his counsel, and the AUSA signed the plea agreement, which was approved by the court that same day. *Ibid.*

3. On January 28, 2000, respondent, who was represented by OAG, filed a motion in the Family Division of the Superior Court to adjudicate petitioner in criminal contempt for violations of the CPO. Pet. App. A4. Respondent's motion was based on the June 26 incident. *Id.* at A4-A5. On May 11, 2000, after a two-day bench trial, the court found petitioner guilty on three counts of criminal contempt. *Id.* at A5-A6. The court sentenced petitioner to three consecutive 180-day terms of imprisonment, but suspended execution of one of those terms and instead imposed five years of probation. *Id.* at A6. The court also ordered petitioner to pay approximately $10,000 in restitution for medical expenses that respondent incurred as a result of the assault. *Ibid.* Petitioner appealed.

4. a. More than three years later, on November 13, 2003, petitioner filed a motion in the Criminal Division of the Superior Court to vacate his criminal contempt convictions. Pet. App. A6-A7. He claimed that the contempt proceeding had violated his plea agreement with the USAO and that his counsel had been ineffective for not so arguing. *Id.* at A7. Petitioner also filed a motion in the Court of Appeals for the District of Columbia to stay the briefing schedule in his direct appeal. On August 27, 2004, the trial court denied petitioner's motion to vacate. It held that "the plea agreement . . . is

binding only on the government and not on any party seeking to vindicate a right against [petitioner] arising from the events of June 26, 1999." *Ibid.* Petitioner appealed from that order, and the appeal was consolidated with the pending direct appeal from his criminal contempt convictions. *Id.* at A1-A2.

b. The court of appeals affirmed. Pet. App. A1-A25. Based on its precedent and the text and purposes of D.C. Code § 16-1005(f) (West Supp. 2009), the court read that provision to confer "a private right of action" on the holder of a CPO "to enforce the CPO through an intra-family contempt proceeding." Pet. App. A13 (quoting *Green* v. *Green*, 642 A.2d 1275, 1280 n.7 (D.C. 1994)). It rejected petitioner's submission that the contempt proceeding could "only be brought in the name of the relevant sovereign, the United States." *Id.* at A15 (internal quotation marks, ellipsis and citation omitted). The court reasoned that conferring such a private right of action "does not contravene the general principle that criminal prosecutions are prosecuted in the name of the sovereign," because of "the special nature of criminal contempt." *Ibid.* Unlike other criminal prosecutions, the court explained, criminal contempt enforces judicial orders rather than general criminal laws. *Ibid.*

Based on that analysis, the court held that respondent's contempt proceeding against petitioner was not barred by his plea agreement, because that agreement bound only the USAO—not respondent or the OAG. Pet. App. A19-A20. In light of the handwritten changes to the plea agreement form, the court concluded, "no objectively reasonable person could understand that [petitioner's] plea agreement bound [respondent] * * * [or] the District." *Id.* at A20. The absence of a bar on respondent's action was confirmed, the court added, by

D.C. Code § 16-1002(c) (West 2001), which provides that "[t]he institution of criminal charges by the United States attorney shall be in addition to, and shall not affect the rights of the complainant to seek any other relief under this subchapter." *Ibid.*; see Pet. App. A20 n.7.

DISCUSSION

Whether the Constitution permits a private, interested party to maintain an action for criminal contempt in her own name and interest in order to redress violations of a CPO involves complex issues that might warrant this Court's attention in an appropriate case. Petitioner, however, as a matter of litigation strategy, has declined to press or develop critical aspects of those issues; the key statutory and constitutional questions are therefore presented only incompletely in this case. Even assuming that petitioner had thoroughly presented those questions, this case would remain an unsuitable vehicle for addressing them, because petitioner would not be entitled to relief in any event based on his particular plea agreement. Accordingly, the Court should deny the petition for a writ of certiorari.

A. The Court Of Appeals' Decision Does Not Conflict With Any Decision Of This Court Or Another Court Of Appeals

1. While petitioner raises a due process question concerning the authority of a CPO beneficiary to institute a criminal contempt action in her own name, equally significant are the issues that petitioner either concedes or does not raise.

a. Section 16-1003 of the D.C. Code permits any victim of domestic violence to petition for a CPO in family court, and Section 16-1005(f) provides that any violation of a temporary or permanent CPO issued by that

court "shall be punishable as contempt." D.C. Code § 16-1005(f) (West Supp. 2009). Section 16-1005(f) further provides that "[u]pon conviction, [such] criminal contempt shall be punished by a fine not exceeding $1,000 or imprisonment for not more than 180 days, or both." *Ibid.*

In *Green* v. *Green*, 642 A.2d 1275 (D.C. 1994), the court interpreted Section 16-1005(f) to "reflect a determination by the Council [of the District of Columbia] that the beneficiary of a CPO should be permitted to enforce that order through an intrafamily contempt proceeding." *Id.* at 1279. According to the court, when the Council amended the District's intrafamily offenses statute in 1982, the Council created a private right of action to obtain a CPO because OAG was unable to effectively prosecute the growing incidences of domestic violence. *Id.* at 1279 n.7. The court then observed that OAG had professed a similar inability to effectively prosecute criminal contempt motions for violations of CPOs. *Ibid.* Based on that observation, "as well as the procedural scheme established for enforcing CPOs," the court concluded that "[the] considerations supporting a private right of action to seek a CPO apply equally to a private right of action to enforce the CPO through an intrafamily contempt proceeding." *Id.* at 1280 n.7.

In this case, the court of appeals relied on *Green* to hold that respondent has a private right of action to enforce her CPO through a criminal contempt proceeding. Pet. App. A12-A16. Petitioner does not contest *Green* or its interpretation of Section 16-1005(f). Pet. 17 n.13. Petitioner thus recognizes that the court of appeals has construed District of Columbia law to confer a private right of action for criminal contempt on the holder of a CPO, and he does not ask this Court, as the ultimate

arbiter of District of Columbia law, to review that statutory holding. See *Whalen* v. *United States*, 445 U.S. 684, 687-688 (1980); cf. *Pernell* v. *Southall Realty*, 416 U.S. 363, 368-369 (1974) (discussing this Court's "long-standing practice of not overruling the courts of the District on local law matters save in exceptional situations where egregious error has been committed") (internal quotation marks and citation omitted).

b. Petitioner also does not argue that the Constitution requires criminal contempt to be prosecuted by a disinterested prosecutor. Pet. 17 n.13. It is a serious question whether the Due Process Clause of the Fifth Amendment permits the District of Columbia to confer a private right of action for criminal contempt on the interested beneficiary of a CPO. Compare *Wilson* v. *Wilson*, 984 S.W.2d 898, 903-904 (Tenn. 1998) ("We hold that Due Process does not mandate adoption of a rule which automatically disqualifies a litigant's private counsel from prosecuting a contempt action."), cert. denied, 528 U.S. 822 (1999), with *People* v. *Calderone*, 573 N.Y.S.2d 1005, 1007 (Crim. Ct. 1991) ("[P]rivate prosecutions by interested parties or their attorneys present inherent conflicts of interest which violate defendants' due process rights.").

In *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), this Court held that federal courts have "inherent authority to initiate contempt proceedings for disobedience to their orders," *id.* at 793, and to appoint private attorneys to prosecute a contempt action. *Id.* at 794-796. In an exercise of its "supervisory power," however, the Court ruled that "counsel for a party that is the beneficiary of a court order may not be appointed to undertake contempt prosecutions for alleged violations of that order." *Id.* at 790; see *id.* at 804

("A private attorney appointed to prosecute a criminal contempt therefore certainly should be as disinterested as a public prosecutor who undertakes such a prosecution.").

This case concerns private prosecution of criminal contempt pursuant to a District of Columbia statute rather than an exercise of the inherent authority of an Article III court, as was at issue in *Young*. The court of appeals in *Green* seemingly rejected a due process objection to the District of Columbia's statutory scheme, noting that *Young* was not a constitutional decision; reasoning that not all protections normally applicable to criminal prosecutions are required for certain criminal contempts; and observing that local law provides "adequate protections to alleged contemnors." 642 A.2d at 1280-1281. But the *Young* Court recognized that the exercise of power by interested prosecutors may raise due process issues, 481 U.S. at 808 & n.19, and private prosecutors enforcing CPOs presumably are interested parties.

Petitioner, however, has expressly declined to raise those issues or to challenge *Green* at any point in the proceedings. See Pet. 17 n.13 ("[Petitioner] never has challenged the *Green* court's holding that interested attorneys can stand in the courtroom well and physically prosecute [Section] § 16-1005(f) actions."); Pet. C.A. Reply Br. 4 & n.3 ("[Petitioner] in no way challenges the *Green* holding" that "interested CPO holders can serve as private prosecutors in [Section] § 16-1005(f) criminal contempt actions."). Accordingly, the due process issue that petitioner does raise—whether a private prosecutor in a contempt action in fact exercises governmental power—arises in an abstract and artificial context. Because this case does not present a key constitutional

issue that the Court should consider if it were to entertain a challenge to Section 16-1005(f)—*i.e.*, whether an interested private prosecutor may maintain a criminal contempt action—this case is a poor vehicle for this Court's review.

2. The claim that petitioner does raise is not controlled by this Court's precedents. Petitioner asserts (Pet. 16-27) that, under this Court's case law, the CPO holder must be deemed to represent the United States when prosecuting a criminal contempt. (He asserts that claim as a predicate to his argument that the plea agreement with the USAO bars respondent's contempt prosecution.) Contrary to petitioner's assertion, this Court has never considered whether a private prosecution for criminal contempt must be treated as an action brought in the name and interest of the authorizing sovereign.

a. Petitioner points (Pet. 14-15) to this Court's oft-repeated statement that "[c]riminal contempt is a crime in the ordinary sense." *Bloom* v. *Illinois*, 391 U.S. 194, 201 (1968); see *Young*, 481 U.S. at 799; *International Union, United Mine Workers* v. *Bagwell*, 512 U.S. 821, 826 (1994). But what the Court has meant by that statement is that the adjudication of criminal contempt must be attended by many of the same procedural protections for defendants that attend the adjudication of other crimes. See *Young*, 481 U.S. at 798-799. The Court has not meant that the prosecution of criminal contempt necessarily must be lodged in someone who acts for or represents the government. As the Court explained in *Young*,

> [t]he fact that we have come to regard criminal contempt as 'a crime in the ordinary sense,' does not mean that any prosecution of contempt must now be considered an execution of the criminal law in which

> only the Executive Branch may engage. Our insistence on the criminal character of contempt prosecutions has been intended to rebut earlier characterizations of such actions as undeserving of the protections normally provided in criminal proceedings.

Id. at 799-800 (internal quotation marks and citation omitted).

Petitioner correctly notes (Pet. 16-17 & n.12) that when private parties are appointed to prosecute criminal contempt pursuant to Federal Rule of Criminal Procedure 42(a)(2), they represent the United States as the appointing party. See, *e.g.*, *Young*, 481 U.S. at 804 ("Private attorneys appointed to prosecute a criminal contempt action represent the United States, not the party that is the beneficiary of the court order allegedly violated."); *United States* v. *Providence Journal Co.*, 485 U.S. 693, 700 (1988) ("Private attorneys appointed to prosecute a criminal contempt action represent the United States.") (internal quotation marks and emphasis omitted). But this Court has never addressed whose interests private parties represent when they prosecute criminal contempt as the result of a statutory private right of action rather than a judicial appointment.

b. Petitioner relies (Pet. 17-24) on *United States* v. *Dixon*, 509 U.S. 688 (1993), and *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418 (1911). Neither of those cases addresses whether a private prosecution for criminal contempt must be treated as an action brought in the name and interest of the authorizing sovereign.

i. In *Dixon*, this Court considered a pair of consolidated cases involving the permissibility of successive prosecutions under the Double Jeopardy Clause. In one of those cases, the defendant, Michael Foster, was found guilty of criminal contempt under Section 16-1005(f) for

violating two CPOs. *Dixon*, 509 U.S. at 693. That criminal contempt action was prosecuted by attorneys representing Foster's estranged wife and mother-in-law, the holders of the CPOs. *Id.* at 692. The USAO subsequently indicted Foster for the assaults and threatening conduct that had formed the basis for the contempt prosecution. *Id.* at 693. Foster claimed that the successive prosecution was barred by the Double Jeopardy Clause, *ibid.*, and this Court agreed insofar as the contempt offenses and the substantive offenses contained the same elements under *Blockburger* v. *United States*, 284 U.S. 299 (1932). *Dixon*, 509 U.S. at 700-703.

Petitioner argues (Pet. 19) that Foster's criminal contempt prosecution must have been brought on behalf of the United States, because double jeopardy bars only successive prosecutions by the same sovereign. See *Heath* v. *Alabama*, 474 U.S. 82, 88 (1985). As petitioner recognizes, however, whether an action is brought on behalf of a sovereign depends on "the ultimate source of the power" under which the prosecution was taken, not the identity of the prosecutor. Pet. 19 (quoting *United States* v. *Wheeler*, 435 U.S. 313, 320 (1978)); cf. *Heath*, 474 U.S. at 88 ("In applying the dual sovereignty doctrine, then, the crucial determination is * * * whether the two entities draw their authority to punish the offender from distinct sources of power."). In this case, as in *Dixon*, "the ultimate source of the power" for a criminal contempt prosecution under Section 16-1005(f) is Article I of the Constitution. But that does not answer the question of whether, when the District of Columbia legislature acts pursuant to that power and creates a private cause of action for criminal contempt, a party who subsequently invokes that statutory cause of action represents her own interests or those of the Uni-

ted States. Application of the double jeopardy bar did not depend on resolution of that question, and *Dixon* did not decide it. Cf. *Dixon*, 509 U.S. at 692 ("[T]he United States was not represented at trial.").[1]

ii. In *Gompers*, a group of labor officials were enjoined from boycotting a stove manufacturer. 221 U.S. at 436. The company subsequently brought a contempt proceeding, alleging that the officials had published statements in violation of the injunction. *Ibid.* After the officials were found guilty of contempt, they were sentenced to terms of imprisonment ranging from six to twelve months. *Id.* at 435. The officials then claimed that their prison sentences were criminal sanctions that had been improperly imposed in a civil contempt proceeding. This Court agreed. It recognized that both civil and criminal contempt proceedings could result in imprisonment, *id.* at 441-443; but it held that because the officials' imprisonment had been imposed as a punitive rather than a remedial measure, "it could have been properly imposed only in a proceeding instituted and tried as for criminal contempt," *id.* at 444.

Petitioner points (Pet. 23) to this Court's statement in *Gompers* that "proceedings at law for criminal contempt are between the public and the defendant." 221 U.S. at 445. That statement, however, was intended

---

[1] Petitioner places (Pet. 19 n.15) undue weight on Justice White's assertion in *Dixon* that it was "immaterial" that Foster's "contempt proceeding was brought and prosecuted by a private party," because "private attorneys appointed to prosecute a criminal contempt action represent the United States." 509 U.S. at 727 n.3 (concurring in the judgment in part and dissenting in part) (brackets omitted). That assertion, which in any event did not command a majority of the Court, does not bear on whether a private party represents the government when she institutes a criminal contempt proceeding pursuant to a statutory right of action rather than a judicial appointment.

to distinguish criminal contempt proceedings instituted to vindicate the authority of the court from civil contempts that "are between the original parties, and are instituted and tried as part of the main cause." *Ibid.* The reason for drawing the distinction was that the contempt proceedings at issue in *Gompers* were a continuation of the parties' original equity proceeding, *id.* at 445-450, and thus should have been dismissed when the underlying action settled, *id.* at 451, rather than proceeding to the imposition of criminal punishment. Contrary to petitioner's assertion, the Court in *Gompers* did not hold that there is "no such thing as a criminal contempt prosecution maintained in the name of a private person." Pet. 24. The Court did not have before it any statute purporting to create a private right of action for criminal contempt.

3. Petitioner asserts in passing that "private individuals cannot, consistent with due process, bring criminal actions in their own name." Pet. 21. While petitioner does not contend that due process requires a disinterested prosecutor, see p. 8, *supra*, he relies on *Linda R.S.* v. *Richard D.*, 410 U.S. 614 (1973), for the proposition that due process requires a prosecutor who acts in the name and interest of the sovereign. That case, however, dealt not with due process but with standing. In *Linda R.S.*, a single mother brought suit on equal protection grounds when the local district attorney declined to prosecute the child's alleged father for nonpayment of child support. *Id.* at 615-616. This Court held that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another," *id.* at 619, and therefore affirmed dismissal of the plaintiff's action for want of standing. This Court had no occasion to consider whether, consistent with due process, a leg-

islature may permit a private party to undertake a proceeding for criminal contempt in her own name and interest.

Petitioner does not otherwise develop any argument that the District of Columbia's creation of a statutory private right of action for criminal contempt violates the Due Process Clause of the Fifth Amendment or separation-of-powers principles. He does not cite any decision of any court finding such a constitutional violation. Nor does he discuss this Court's precedents addressing when nominally private conduct can constitute government action for constitutional purposes. See, *e.g.*, *Brentwood Acad.* v. *Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001) ("We have treated a nominally private entity as a state actor * * * when it has been delegated a public function by the State."); *Georgia* v. *McCollum*, 505 U.S. 42, 51 (1992); *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 627-628 (1991). Petitioner does not develop any argument that the prosecution of criminal contempt is the sort of public function that constitutes governmental action even when performed by private parties.

Given the complexity and importance of those constitutional issues, this Court should await a properly developed challenge to Section 16-1005(f). The majority of States allow private parties to prosecute criminal contempt. See Joan Meier, *The "Right" to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests*, 70 Wash. U. L.Q. 85, 103-104 & n.89 (1992). But the circumstances in which States allow such prosecutions vary widely. *Id.* at 104-107. Because any decision addressing the constitutionality of a statutory private right of action for criminal contempt could apply broadly to many States' laws, the Court should

await a case that fully presents the relevant statutory and constitutional questions. For example, a decision that addressed whether private parties may serve as contempt prosecutors in their own names and not as governmental representatives, without addressing whether interested private parties may do so at all, could result in an abstract or limited decision that has little relevance to many actual statutory schemes. Further review of petitioner's claims is therefore not warranted in the context of this case.

B. This Case Is An Unsuitable Vehicle In Any Event For Examining The Issues Raised By Private Prosecution Of Criminal Contempt

Even assuming that the Due Process Clause required respondent to represent the United States when prosecuting the criminal contempt action at issue, petitioner still would not be entitled to relief on the facts of this case. For that reason, this case is an unsuitable vehicle for examining any constitutional issues raised by prosecution of criminal contempt by the holders of CPOs. Cf. *Rescue Army* v. *Municipal Ct.*, 331 U.S. 549, 569 (1947) ("[C]onstitutional issues affecting legislation will not be determined * * * if the record presents some other ground upon which the case may be disposed of.").

1. Even if respondent were thought to represent the United States when prosecuting petitioner for criminal contempt, that still would not have violated the plea agreement that is at the center of petitioner's claim. See Pet. 30 ("In a criminal contempt action maintained in the United States' name and power, an alleged contemnor is entitled to the benefit of bargained-for promises made by government lawyers."); see also Pet. 2, 5, 31 (relying on plea agreement as ultimate source of re-

lief). That agreement was solely between petitioner and the United States Attorney's Office for the District of Columbia. The AUSA handling petitioner's case crossed through "District of Columbia" in the caption of the agreement, so that it read only "United States vs. John Robertson." App. *infra*, 1a. The AUSA also crossed through "Assistant Corporation Counsel" in his signature line, so that it read only "Assistant U.S. Attorney." *Ibid.* The AUSA then wrote at the top of the form: "In exchange for Mr. Robertson's plea of guilty to Attempted Aggravated Assault, gov't agrees to" dismiss the remaining charges and "not pursue any charges concerning an incident on 6-26-99." *Ibid.*

As the court of appeals recognized, in context "the abbreviated word 'gov't' clearly referred to the United States, not [respondent], and certainly not the District of Columbia since that name was deleted." Pet. App. A20. By crossing through "the District of Columbia" and "Assistant Corporation Counsel," the AUSA made clear that the plea agreement covered only the USAO, and not the District of Columbia itself or its Office of the Attorney General. Indeed, in the context of federal plea agreements, "within the criminal justice system throughout the country, the term 'the government' is widely used and understood to refer to the 'prosecution' or 'the United States Attorney.'" *United States* v. *Rourke*, 74 F.3d 802, 807 (7th Cir.), cert. denied, 517 U.S. 1215 (1996).

A plea agreement made by one United States Attorney's Office does not normally bind any other agency or entity acting on behalf of the United States. See, *e.g.*, *United States* v. *Camacho-Bordes*, 94 F.3d 1168, 1175 (8th Cir. 1996) (plea agreement by United States Attorney, on behalf of "the Government," did not bind the

INS); *United States* v. *Annabi*, 771 F.2d 670, 672 (2d Cir. 1985) (plea agreement by one United States Attorney, on behalf of "the Government," did not bind another United States Attorney's Office, "unless it affirmatively appears that the agreement contemplates a broader restriction"). Even under an approach that construes plea agreements by one United States Attorney's Office to cover other such offices, and requires restrictions on the scope of such an agreement to appear on its face, see *United States* v. *Gebbie*, 294 F.3d 540, 550 (3d Cir. 2002); see also *United States* v. *Johnston*, 199 F.3d 1015, 1020 (9th Cir. 1999) (discussing *United States* v. *Harvey*, 791 F.2d 294, 303 (4th Cir. 1986)), cert. denied, 530 U.S. 1207 (2000), the agreement in this case evinces an intent to limit its scope to the United States Attorney's Office in question. Certainly, no logic justifies construing the agreement to cover a private prosecutor in a contempt action who, at the time of the agreement, was understood by local law to pursue such claims in her own right. The court of appeals therefore correctly concluded that "no objectively reasonable person could understand that [petitioner's] plea agreement bound [respondent] and precluded her contempt proceeding * * *, or that the agreement bound the District, a distinct, separate governmental entity." Pet. App. A20.

That conclusion is especially appropriate in view of D.C. Code § 16-1002(c) (West 2001). At the time petitioner signed his plea agreement, Section 16-1002(c) provided that "[t]he institution of criminal charges by the United States attorney shall be in addition to, and shall not affect the rights of the complainant to seek any other relief under this subchapter." Section 16-1002(c) thus placed petitioner and his counsel on notice that the USAO's institution of criminal charges (and its subse-

quent resolution of those charges in a plea agreement) did not affect respondent's right to seek her own relief by instituting a criminal contempt proceeding.[2] In light of both the specific terms of the plea agreement at issue and the legal backdrop for that agreement, petitioner could not reasonably have believed that the agreement precluded respondent from instituting a proceeding against him for criminal contempt under Section 16-1005(f).

2. Petitioner did not contend at any point during his trial for criminal contempt in the Family Division of the Superior Court that the proceeding violated his earlier plea agreement. Rather, while his direct appeal from the criminal contempt convictions was pending before the court of appeals, petitioner filed a motion in the Criminal Division of the Superior Court to vacate those convictions pursuant to D.C. Code § 23-110(a) (West 2001). Pet. App. A6-A7. When that motion was denied, petitioner appealed, and the court of appeals consolidated petitioner's direct and collateral appeals. *Id.* at A1-A2.

With respect to petitioner's direct appeal, his failure to timely raise the claim means that it is reviewed for plain error. See D.C. Super. Ct. R. Crim. P. 52(b); *Green* v. *United States*, 948 A.2d 554, 559 (D.C. 2008).

---

[2] Since the time that petitioner signed his plea agreement, Section 16-1002(c) has been amended. See D.C. Code § 16-1002 (West Supp. 2009). In its present form, Section 16-1002 continues to provide that the holder of a CPO "has a right to seek relief," including by instituting a criminal contempt action. According to Section 16-1002, that right "does not depend on the decision of the Attorney General, the United States Attorney for the District of Columbia, or a prosecuting attorney in any jurisdiction to initiate or not to initiate a criminal or delinquency case or on the pendency or termination of a criminal or delinquency case involving the same parties or issues." *Ibid.*

An error constitutes reversible plain error only if the defendant can show that (1) there was an error, (2) the error was obvious, (3) the error affected substantial rights, and (4) the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Ibid.* A case requiring those additional showings would be an unsuitable vehicle for addressing the underlying legal question—*i.e.*, the permissibility of a statutory private right of action for criminal contempt. Petitioner does not attempt to explain how he could show obvious error, given the absence of any decision from this Court or any court of appeals invalidating a statutory private right of action for criminal contempt.

With respect to petitioner's collateral appeal, petitioner would be entitled to relief only upon a demonstration of cause for his failure to timely raise the claim and prejudice as a result of that failure. See, *e.g.*, *Head* v. *United States*, 489 A.2d 450, 451 (D.C. 1985) ("Where a defendant has failed to raise an available challenge to his conviction on direct appeal, he may not raise that issue on collateral attack unless he shows both cause for his failure to do so and prejudice as a result of his failure."). Just as petitioner does not attempt to demonstrate plain error, he does not attempt to demonstrate justifiable cause. In those circumstances, this case does not present an appropriate opportunity for considering the difficult issues raised by purely private prosecution of criminal contempt by the holders of CPOs.

3. Finally, even assuming that respondent's criminal contempt prosecution both breached the plea agreement and rose to the level of plain error, it is not clear that petitioner seeks an appropriate remedy for the breach. Petitioner recognizes that "specific performance is no longer available," but argues for "a remedy approximat-

ing specific performance: a reversal of [his] convictions for criminal contempt." Pet. C.A. Br. 36. Specific performance is generally disfavored, however, when it would undermine third-party interests, see Restatement (Second) of Contracts § 364 (1981), such as respondent's interest in protecting her personal safety and security by pursuing an action for criminal contempt under D.C. Code § 16-1005(f) (West Supp. 2009). Accordingly, the more appropriate remedy might be rescission—*i.e.*, withdrawal of petitioner's guilty plea to attempted aggravated assault. See *Puckett* v. *United States*, 129 S. Ct. 1423, 1430 (2009) (citing 26 Richard A. Lord, *Williston on Contracts* § 68.1 (4th ed. 2003)). To the extent that such relief would not aid petitioner (because he has served the sentence imposed for his assault conviction), that is because petitioner waited three years before claiming a breach of the plea agreement. In any event, petitioner does not defend his choice of remedy before this Court, and the need to resolve that question as a predicate to relief provides an additional reason why further review of petitioner's claims is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
LANNY A. BREUER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
JEFFREY B. WALL
Assistant to the Solicitor General
JOSEPH F. PALMER
Attorney

NOVEMBER 2009

In exchange for Mr. Roberts's plea of guilty to Attempt Aggravated Assault, Gov't agrees to:

Superior Court of the District of Columbia
Criminal Division

Reserves step-back allo

~~Dismiss~~ the Charges of Agg Assault ADW Knife
DISMISS

United States ADW
District of Columbia

Not pursue any charges concerning an incident on 6-26-99

vs.

Criminal No. F-2056-99

John Roberts

(1a)

WAIVER OF TRIAL BY JURY OR COURT UPON ENTRY OF GUILTY PLEA

YOU ARE NOT REQUIRED TO PLEAD GUILTY. If you do plead guilty, you will give up important rights, some of which are stated below.

First, you give up your constitutional right to a trial by jury or by the court. At a trial th Government would be required to present evidence to prove you are guilty beyond a reasonable doubt. Yo would have the right to cross-examine the government's witnesses and you could have witnesses come t court and testify for you. You also would have the right to testify if you wanted to; however, if you chose n to present testimony that decision could not be used against you. You could not be convicted at a jury tri unless all 12 jurors agreed that the government had proved your guilt beyond a reasonable doubt. You cou not be convicted in a non-jury trial unless the court found that the government had proved your guilt beyond reasonable doubt.

Second, you give up the right to appeal your conviction to the Court of Appeals. This is a right yo would have if you were convicted following either a jury or non-jury trial. The right to appeal includes th right to have the Court of Appeals appoint a lawyer for you and pay for the lawyer's services to represent yo in the Court of Appeals if you could not afford a lawyer.

Third, if you are not a citizen of the United States, your plea of guilty could result in you deportation, exclusion from admission to the United States, or denial of naturalization.

Your signature on this form means that you wish to plead guilty and give up your right to a tri of any kind, and your right to appeal. When your plea is accepted by the court, you will be convicte and the only matter left in this case will be for the court to sentence you.

I HAVE REVIEWED THIS FORM WITH MY LAWYER AND HAVE DECIDED TO PLEAD GUILT IN THIS CASE. I HAVE DECIDED TO GIVE UP MY CONSTITUTIONAL RIGHT TO HAVE A TRIAL AN TO GIVE UP MY RIGHT TO APPEAL.

John Roberts — *Defendant*

James Smith #461772 — *Attorney for Defendant*

APPROVED this 21th *day of*

David J. Cannon — *Assistant U.S. Attorney or Assistant Corporation Counsel*

July (Date) 1999 (Year)

0000065

Judge

White - Court Jacket Canary - USAO Pink - Defense Attorney Goldenrod - Defendant

Form CD-287(Mar 99

JOINT APPENDIX

(5)

No. 08-6261

Supreme Court, U.S.
JAN 28 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JOHN ROBERTSON,

Petitioner,

v.

UNITED STATES *ex rel.* WYKENNA WATSON,

Respondent.

On Writ of Certiorari to the District of Columbia Court of Appeals

JOINT APPENDIX

JAMES W. KLEIN*
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Petition For Writ Of Certiorari Filed September 10, 2008
Certiorari Granted December 14, 2009

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Superior Court of the District of Columbia
DOMESTIC VIOLENCE UNIT

Wykenna Watson vs John Robertson

[Illegible]
Respondent's Name

Attorney for Petitioner
Name: Kristen Hansen
Bar Number: 465101
Phone Number: 442-9751

Attorney for Petitioner
Name: James Smith
Bar Number: 461772
Phone Number: [Illegible]

DATE	ENTRIES	JUDGE
3/29/99	Petition for CPO filed. NOHOTA issued.	
	Hearing date set for April 12, 1999, courtroom 101 at 8:30 am. ATPO is requested	
3/29/99	Respondent is LU #19	
3/29/99	Ctrm 101. Petitioner is present & the request for a TPO is granted. Respondent to be served in cellblock	Satterfield
4-26-99	Ctrm 101 Parties present. Contested hearing held Civil Protection Order signed and	H/C Melendez

	filed within. Case set for financial review on 10-27-99 at 9:30 am in Ctrm 108	
01-28-00	Motion to Adjudicate Criminal Contempt Motion to Modify & Affidavit filed by Petitioner's atty. Lewis	
5-10-00	Ctrm 219 ACC Hansen, Petitioner, Respondent and counsel present. Criminal contempt hearing held in part; case continued at 5-11-00 at 12:00 noon in Ctrm 219	
5-11-00	Ctrm 219 ACC Hansen, Petitioner, Respondent and counsel present. Criminal contempt hearing held and completed. Respondent found not guilty as to count (C) and Count (D) Contempt; Respondent found guilty as to counts (A), (B) and (E) Contempt. Case set for sentencing on 6-14-00 at 9:30 am before Judge Davis. PSI ordered and shall be completed by 6-12-00. Please note, Respondent is locked-up DC Jail. CPO is extended to June-15-00. Order signed and filed within	
6-14-00	Ctrm 102 ACC Hansen, Petitioner, Respondent and counsel present Respondent sentenced	Davis

	to Counts (A), (B) and (E) Contempt – Count (E) 180 days consecutive to any other sentence being served. Count (A) 180 days to run consecutive to Count (E). Count (B) 180 days to run consecutive to Counts (A) and (E); ESS as to Count (B) only. (5) Five years probation. Restitution in the amount of $10 0009.31 to be paid during 60 month probation period. VVCCA $150.00 to be deducted from Jail pay. Order signed and filed within.	
6-14-00	Ctrm 102 Modified and extended Civil Protection Order signed + filed within	Davis
7-25-00	Notice of Appeal filed	
11/18/2003	MOTION to vacate CONVICTION – FORWARDED TO J. DAVIS	
08/24/2004	Order Signed by Judge Davis that the Respondent's Motion to Vacate Convictions is Denied. Copies of order mailed from chambers. Case returned to clerk's office on 8-31-04 for processing.	
10/15/2004	Notice of Appeal Filed	

DISTRICT OF COLUMBIA COURT OF APPEALS

CASE NUMBER 00-FM-000925

CASE TITLE

JOHN ROBERTSON

APPELLANT

V.

WYKENNA WATSON

APPELLEE

FILINGS/PROCEEDINGS

7/11/2000 NOTICE OF APPEAL

DISTRICT OF COLUMBIA COURT OF APPEALS

CASE NUMBER 04-FM-001269

CASE TITLE

IN RE: JOHN ROBERTSON, APLT.

FILINGS/PROCEEDINGS

9/13/2004 NOTICE OF APPEAL

10/22/2004 ORDER, SUA SPONTE, CONSOLIDATING APPEALS nos. 00-FM-925 and 04-FM-1269 for all purposes herein.

It is

F/O that James W. Klein, Esquire, is hereby appointed to represent appellant in appeal no. 04-FM-1269.

It is

F/O that is consolidated briefing order will be issued upon the filing in the court, by the Clerk of the Superior Court, in appeal no. 04-FM-1269, the record index and record copies required by D.C. App. R. 11(b)(3)(A).

2/10/2006 APPELLANT'S BRIEF

2/10/2006 APPENDIX – aplt's

6/21/2006 APPELLEE'S BRIEF

12/22/2006 APPELLANT'S REPLY BRIEF

1/09/2007 ARGUED before Judges Farrell, Reid, Kern Lee R. Goebes, Esq. for appellant Janice Y. Sheppard, Esq. for appellee

1/11/2007 ORDER

This case was heard on 1/9/07. One of the issues in the case is whether a plea agreement, entered into by aplt and the Ofc of the U.S. Attorney for D.C., was violated when the aple, a private party represented by the Ofc of the Atty General for D.C., took action to enforce a civil protection order (CPO) by filing a motion for criminal contempt in the Sup. Ct. of D.C., the court which had issued the CPO. It apprg that this matter involves the U.S. Atty, D.C., and it further apprg that this court would benefit from the views of that office, the court hereby requests a response to the following question:

(1) Do the laws by which the D.C. government bound require all criminal contempt prosecution in the Sup. Ct. to be maintained in the name of the U.S.? (2) Is a criminal contempt proceeding, brought under DC Code Sec. 16-1005(f) designed to enforce the interests of the U.S. government, the D.C. government, the court which issued the pertinent CPO, or the private party who obtained the CPO? (3) Is the D.C. government, or the person who obtained a CPO (and his or her representative) bound by a plea agreement between the U.S. and a defendant (later a contemnor) in which the U.S. promises not to pursue or proceed on any other charges against the individual in exchange for a guilty plea to a specified criminal offense? To facilitate the U.S.' understanding of these questions, the court is providing a copy of the record and briefs submitted in this matter. It is ORDERED that any views in which the U.S. wishes to express on the questions set forth above must be filed within 30 days of the date of this order, and delivered by hand to the aplt (represented by PDS) and the aple (represented by the Atty General, D.C.). PDS and the Atty General, D.C., must file any response to the U.S. views within 15 days following service by the United States.
(FA,RD,KN)

2/12/2007 APPELLEE'S [sic] ANSWER/RESPONSE – to court order 1/11/07

2/28/2007	AMICUS CURIAE'S BRIEF (Domestic Violence legal Empowerment and appeal project (dv Leap), ayuda, break the cycle, d.c. coalition against domestic violence and women empowered against violence (weave) in support of aple
3/13/2007	APPELLANT'S ANSWER/RESPONSE – to 2/15/07 order
3/20/2007	APPELLEE'S ANSWER/RESPONSE – 2/15/07 order
1/24/2008	AFFIRMED Opinion (Farrell, Reid, Kern) and Judgment affirming the judgments of the trial court.
3/18/2008	APLT'S PETITION FOR REHEARING/REHEARING EN BANC
5/01/2008	APPELLEE'S OPPOSITION (U.S. as Amicus Curiae) to aplt's pet for reh/reh en banc.
5/06/2008	APPELLEE'S OPPOSITION to pet for reh/reh en banc (of Watson)
6/13/2008	AMICUS CURIAE'S BRIEF (of National Association of Criminal Defense Lawyers, et al) in support of petition
6/13/2008	AMICUS CURIAE'S BRIEF (of Domestic Violence Legal Empowerment and Appeals Project, et al) in opposition to petition

6/13/2008	ORD DENY APPELLANT'S PETITION FOR REH/REH EN BANC and grant the motion of Nat'l Assn of Criminal Defense Lawyers, et al and the motion of Domestic Violence Legal Empowerment and Appeals Project, et al for leave to file briefs and the Clerk is directed to file the lodged briefs of amici.
9/16/2008	NOTICE OF FILING A PETITION FOR WRIT OF CERTIORARI

SUPERIOR COURT OF
THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

COMPLAINT

No. F205699

District of Columbia ss:

The undersigned having made oath before me declared that on OR ABOUT 27TH day of MARCH, A.D. 1999, at the District aforesaid, one JOHN E. ROBERTSON OF [Home Address Omitted]

DID BY ANY MEANS KNOWINGLY AND PURPOSELY CAUSE SERIOUS BODILY INJURY TO WYKENNA WATSON

In violation of Title 22 Section 504.1 of the District of Columbia Code.

/s/ Willie Harris
Affiant's Name:

Subscribed and sworn to before me this 29TH day of MARCH, A.D. 1999

/s/ [Illegible]
~~(Judge)~~ (Deputy Clerk)
Superior Court of the
District of Columbia

WARRANT

To the United States Marshal or any other authorized federal officer or the chief of Police of the District of Columbia:

WHEREAS the foregoing complaint and affidavit supporting the allegations thereof have been submitted, and there appearing probable cause and reasonable grounds for the issuance of an arrest warrant for _____

_____

YOU ARE THEREFORE COMMANDED TO BRING THE DEFENDANT BEFORE SAID COURT OR OTHER PERSON ENUMERATED IN 18 U.S.C. 3041 forthwith to answer said charge.

Issued _____, 19___.

SEX:	MALE
DOB:	[OMITTED]
CCR:	161-597
PDID:	510-416
Charge:	AGGRAVATED ASSAULT
Date of Offense:	ON OR ABOUT 3-27-99
Officer:	WILLIE HARRIS

Badge No. 2671 6D

_____
Judge

Superior Court of the District of Columbia.

OFFICER MUST EXECUTE RETURN:

Officer's Name _____

Time _____

Date _____

ARREST NUMBER 06990177

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

FAMILY DIVISION/DOMESTIC RELATIONS BRANCH

Wykenna Watson, *Petitioner vs.* IF No. 785-99

John E. Robertson, *Respondent*

PETITION AND AFFIDAVIT FOR CIVIL PROTECTION ORDER

Pursuant to D.C. Code Section 16-1001 *et seq.*; Petitioner respectfully requests that the court issue a 12-month Civil Protection Order against Respondent. In support of this request, Petitioner states:

1. Respondent is related to Petitioner by __ Blood; __ Legal Custody; __ Having a Child in Common; ✓ Now or Previously Having Shared the Same Residence; ✓ Romantic/Dating Relationship*

***If related by Romantic/Dating Relationship*:**

Do you reside in the District of Columbia	✓ Yes __ No
Did any incident described below occur in the District of Columbia	✓ Yes __ No

2. Respondent committed or threatened to commit an act punishable as a criminal offense against Petitioner within the meaning of D.C. Code Section 16-1001 *et seq.*, by: (*Please describe any such acts, including physical assaults like hitting, punching, shoving or kicking; threats to do harm; destruction of property*).

A. **On or about March 27, 1999**, at approximately at 5 p.m. at [Home Address Omitted], 20019:

Respondent beat petitioner. Using a closed fist, he hit her in the head, face, and various parts of her body. Petitioner has a black eye and head injuries as a result of these blows. Petitioner tried to flee from respondent, from bedroom to kitchen, but respondent followed her. Respondent knocked petitioner to the floor, where he continued to beat her with his fists and also kicked her repeatedly. Respondent kicked petitioner in the head several times while wearing heavy work shoes. Respondent also pulled out a pocket knife, blade approximately 4 inches long, and threatened to kill petitioner. Police were called to the scene, respondent was arrested.

ON THE BASIS OF THESE ALLEGATIONS, PETITIONER REQUESTS AN ORDER INCLUDING THE FOLLOWING RELIEF: (*Check each form of relief you wish to be awarded by the court*)

1. ☑ Ordering Respondent not to abuse, threaten, or harass me and/or my children and/or not to physically discipline my children.

2. ☐ Ordering Respondent not to abuse, threaten, or harass other persons (*names*): mother: Jacqueline Watson

3. ☑ Ordering Respondent to stay away from: ☑ my person; ☑ my work; ☑ my home; ☐ my children's school/daycare; ☑ other persons (*names*); Jacqueline Watson ; ☐ other places I frequent (*describe*):

4. ☑ Ordering Respondent not to contact me: ☑ by telephone; ☑ in writing; ☑ in any other manner, directly or indirectly through a third party

5. ☐ Awarding me temporary custody of the minor children, named below.
(*state name and date of birth of each child AND bring birth certificates to court hearing*)

_____

_____

IF YOU ARE SEEKING CUSTODY, PLEASE COMPLETE QUESTIONS 5a-5e:

5a. The children's current address is (*You do not need to reveal this information if doing so will put in you in danger*):

_____

5b. Over the past five years the children have lived at the following other addresses (if any):_____

_____

_____

5c. Names and addresses of the people the children have lived with during the past five years:

_____

_____

_____

5d. Have you participated in or do you know of any other court cases concerning custody of these children? ☐ yes ☐ no

If your answer is "yes" please indicate where the other case(s) was/were filed:

_____

5e. Do you know of any other person other than yourself and Respondent who claims to have custody of the children? ☐ yes ☐ no

6. ☐ Awarding Respondent visitation with the child(ren) if Respondent shows that the child(ren) and I can be adequately protected from harm by the Respondent.

7. ☐ Ordering Respondent to pay child support for the above minor children, in an amount in accordance with the D.C. Child Support Guideline, through the Court Registry.

To the best of my knowledge, Respondent's annual gross income equals or exceeds $____

(*Bring any proof of your own AND Respondent's income to court hearing, including 2 recent pay stubs, tax returns for the past two years or a completed financial statement. Also bring proof of any other child support orders that affect you or Respondent.*)

IF YOU ARE SEEKING CHILD SUPPORT, PLEASE COMPLETE QUESTIONS 7a-7d:

7a. Has a paternity and/or child support case already been filed regarding any of the above-listed children? ☐ yes ☐ no If "yes," please indicate where the case was filed, the case number, and the outcome, if any: _____

7b. Are you or your children currently receiving public assistance? ☐ yes ☐ no

7c. Is Respondent currently employed
☐ Yes ☐ No ☐ Don't Know

7d. Do any of the children have special costs? (*e.g., tuition, daycare, medical insurance, cost of medically necessary services*) (*specify*):_____

8. ☐ Ordering respondent to vacate my home, which:
☐ I rent/own by myself; ☐ we rent/own together; ☐ I rent/own with someone other than Respondent
☐ (*Bring lease/deed to court hearing*)

9. ☐ Ordering Respondent to provide me with financial assistance and/or spousal support to pay my rent/mortgage/bills or other expenses.

10. ☑ Awarding possession and use of the following jointly owned property to petitioner:

Petitioner would like possession of the dog, Samson. Petitioner would like respondent to pay for food and vet bills

11. ☐ Ordering Respondent not to remove me and/or my children from his/her health insurance policy.

12. ☑ Ordering Respondent to reimburse me for medical costs, property damage, or other expenses I have incurred due to Respondent's actions (*Bring medical bills, receipts, invoices, or estimates to court hearing*). Damaged property includes (*describe*): medical bills, which include prescriptions

13. ☑ Ordering Respondent to enroll in and complete an appropriate counseling program for:
☐ alcohol abuse; ☐ drug abuse; ☑ domestic violence; ☐ parenting; ☐ Other (*describe*):__

14. ☑ Ordering the police to: ☐ stand by while Respondent vacates my home; ☑ make sure Respondent turns over my keys; ☐ accompany me and stand by while I recover my belongings from Respondent; ☐ assist me with service of process upon the Respondent.

15. ☐ Ordering Respondent to reimburse me for my attorney's fees and costs.

16. ☐ Other (*describe*): _____
_____
_____

17. ☑ The Respondent's actions place the safety or welfare of myself and/or a family member in immediate danger and I request that the court grant me an emergency Temporary Protection Order today.

Petitioner further requests any other relief that is appropriate to the effective resolution of this matter, pursuant to D.C. Code Ann. § 16-1005(c)(10). Petitioner requests that a hearing be set on this matter and that a Notice of Hearing and Order to Appeal be issued to Respondent.

Respondent's address: ☐ Residence ☐ Business ___
_____

DISTRICT OF COLUMBIA, ss: Wykenna Watson, being duly sworn, states that s/he is Petitioner named in this case; that s/he has read and understands the Petition and Affidavit; and that the facts stated herein are true to the best of her/his knowledge.

/s/ Wykenna Watson
Petitioner

/s/ [Illegible] 3/29/99
Deputy Clerk/Corp. Counsel/
Notary Public

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

FAMILY DIVISION

PRAECIPE

Jacket No.: 991F 785 **Date:** 4/26/99

Social File No.: _____

Wykenna Watson
(Plaintiff) ***vs.***

John Robertson
(Defendant or Respondent)

The Clerk of said Court will please note: That the office of the Corporation Counsel wishes to enter an appearance on behalf of the Petitioner in the above referenced matter.	
Attorney's Name: (Please Print) /s/ Thelma C Brown ☑ Plaintiff ☑ Government	Attorney's Name: (Please Print) ☐ Defendant ☐ Respondent
Address: Office of the Corporation Counsel 441 4th St NW Wash DC 20011	Address:
Attorney's Signature: /s/ Thelma C. Brown	Attorney's Signature:

Registration No. 44 1700	Telephone No.	Registration No.	Telephone No.

SUPERIOR COURT OF
THE DISTRICT OF COLUMBIA
DOMESTIC VIOLENCE UNIT

Wykenna L. Watson, Petitioner v. John E. Robertson, Respondent	IF No. 99If000785 Respondent's D.O.B. Omitted Address Omitted

CIVIL PROTECTION ORDER

Upon consideration of the petition filed in this case, and after a hearing, the Court finds that there is good cause to believe that the Respondent has committed or threatened an intrafamily offense within the meaning of D.C. Code Ann. §16-1001 *et seq.* Therefore:

IT IS HEREBY ORDERED that for a period of 12 months from the date of this order:

☒ Respondent shall not assault, threaten, harass, or physically abuse Petitioner ~~or his/her child(ren)~~ in any manner.

☒ Respondent shall stay at least 100 feet away from Petitioner's ☒ person, ☒ home, ☒ workplace, ☐ children's school/daycare, ~~☒ other: dog~~ _____

☒ Respondent shall not contact Petitioner in any manner, including but not limited to: ☒ by telephone; ☒ in writing; ☒ in any other manner, either directly or indirectly through a third party

☐ except under the following conditions: _____

_____

☐ Temporary custody of the following minor children is awarded to: ☐ Petitioner ☐ Respondent until further order of this Court or the expiration date of this Order. (*Specify names and dates of birth.*):

_____

_____

☐ Visitation rights with the above minor children are awarded to: ☐ Respondent ☐ Petitioner under the following conditions. (*Specify dates, times, person who will pick up and drop off, etc.*)

_____

_____

_____

_____

☐ Respondent shall vacate the residence at: _____ on or before (*date*) _____.

The Metropolitan Police Department shall accompany Respondent to retrieve his personal belongings from (*location*) _____ on (*date*) _____ at (*time*) _____ ☐a.m./☐p.m., and stand by to ensure petitioner's safety; and ☐ shall retrieve Petitioner's keys from Respondent.

☐ Child Support, in the amount of $___ per month, shall be paid by: ☐ Respondent ☐ Petitioner.

Payments shall occur on the ___ day of every month, beginning ___, 19___, and shall be made through the D.C. Superior Court Registry, Room 4201, 500 Indiana Ave., N.W., Washington D.C. 20001. Checks will be made payable to the D.C.

Treasurer. Payments shall be forwarded to the Petitioner's (*address*): _____

_____

THE COURT HEREBY FINDS: (*check one*)

☐ The above amount of child support is in accordance with the D.C. Child Support Guideline.

☐ The parties have agreed to the above child support amount and the Court has found this amount to be fair and just.

☐ Application of the D.C. Child Support Guideline would be unjust or inappropriate in this case (*explain*): _____

_____

THE COURT HEREBY FINDS: (*check one*)

☐ Support payments shall be immediately withheld from the earnings or other income of the obligor.

☐ There is good cause not to impose immediate withholding from the earnings of the obligor (*explain*): _____

_____

☐ Because good cause was demonstrated, the alternative method of payment shall be: ____

_____

_____

Obligor's Employment
Information for Withholding Purposes

Name of current employer: _____

Address of current employer: _____

Phone number of current employer: _____

The obligor must notify the court within 10 days of any change in the above employment information. A withholding order may be changed upon motion from either party to request a reappointment of periodic arrears payments to reflect a change in the obligor's ability to pay. The obligor shall make all payments directly into the Court Registry until mandatory wage withholding begins.

☐ Respondent/ ☐ Petitioner shall maintain health insurance coverage for: ☐ the above children; ☐ other:_____, through his/her employer.

☒ Respondent shall provide Petitioner with financial assistance, in the amount of $ ~~350.00~~, ☒ per month; ☐ one time only; ☐ other (*specify*) ___, for; ☐ rent/mortgage assistance; ☐ spousal support; ☐ property damage; ☒ medical costs; ☐ other: _____

Payment shall be made by (*date (s)*): _____ through the D.C. Superior Court Registry, Room 4201, 500 Indiana Ave., N.W., Washington D.C. 20001. Checks will be made payable to the D.C. Treasurer. Payments shall be forwarded to the Petitioner at (*address*): ___

_____

☐ Possession and use of the following jointly owned property is awarded to: ☐ Petitioner; ☐ Respondent:

_____

_____

☒ Respondent shall enroll in and complete a counseling program for:
☒ alcohol/drug abuse; ☒ domestic violence;
☐ parenting skills
☐ other: _____

Respondent shall enroll in the designated program(s) TODAY, in the Probation Office, Room 4206 of the D.C. Superior Court.

☐ The Metropolitan Police Department shall:

_____

_____

☐ Respondent shall reimburse Petitioner for attorney's fee and costs in the amount of $_____ on or before (*date*): _____

☒ Other: Petitioner shall return dog to respondent by taking the dog to her father's house. Respondent shall pick up the dog (and the petitioner shall make sure the dog is at her fathers house) on May 2, 1999. Respondent shall arrange a pick up time with the petitioner's father.

Respondent MUST notify the court if s/he has a change of address at any time.

ANY AND EVERY FAILURE TO COMPLY WITH THIS ORDER IS PUNISHABLE AS CRIMINAL CONTEMPT AND/OR AS A CRIMINAL MISDEMEANOR AND MAY RESULT IN IMPRISONMENT FOR UP TO SIX MONTHS, A FINE OF UP TO $1000, OR BOTH

☒ Matter shall be continued to Oct. 27, 1999 9:30 a.m. to resolve the medical bills.

4/26/99 /s/ Aida L. Melendez
Date Judge

On the date shown below, a copy of this Order was served personally on all parties who have been ordered to comply with any provision of this Order.

4/26/99 /s/ [Illegible]
Date Deputy Clerk

THIS ORDER IS HEREBY EXTENDED FROM (*today's date*): _____, 19__, TO _____, 19__.

_____ _____
Date Judge

On the date shown below, a copy of this Extended Order was served personally on all parties who have been ordered to comply with any provision of the Extended Order.

_____ _____
Date Deputy Clerk

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Sworn in on April 28, 1999

UNITED STATES OF AMERICA	] Criminal No. F2056-99
v.	] Violations: 22 D.C. Code §§ 540.1; 502
JOHN ROBERTSON PDID# 510-416	] (Aggravated Assault; Assault with a Dangerous Weapon)
	] (Filed Jul. 8, 1999)

The Grand Jury charges:

FIRST COUNT:

[C] On or about March 27, 1999, within the District of Columbia, John Robertson did by any means, knowingly and purposely cause serious bodily injury to Wykenna Watson. (Aggravated Assault, in violation of 22 D.C. Code § 504.1).

SECOND COUNT:

[D] On or about March 27, 1999, within the District of Columbia, John Robertson assaulted Wykenna Watson with a dangerous weapon, that is, a knife. (Assault with a Dangerous Weapon, in violation of 22 D.C. Code § 502).

THIRD COUNT:

[E] On or about March 27, 1999, within the District of Columbia, John Robertson assaulted Wykenna Watson with a dangerous weapon, that is, a shodfoot. (Assault with a Dangerous Weapon, in violation of 22 D.C. Code § 502).

/s/ Wilma A. Lewis/RJS
United States Attorney
in and for the District
of Columbia

A TRUE BILL:

/s/ Florence Bender
Foreperson

Superior Court of the District of Columbia
Criminal Division

In exchange for Mr. Robertson's plea of guilty to attempt aggravated assault, the gov't agrees to: DISMISS the charges of Agg Assault
ADW Knife
ADW

Not pursue any charges concerning an incident on 6-26-99

Reserves step-back & allocution

United States
~~District of Columbia~~

vs.

Criminal No. F-2056-99

John Robertson

WAIVER OF TRIAL BY JURY OR COURT UPON ENTRY OF GUILTY PLEA

YOU ARE NOT REQUIRED TO PLEAD GUILTY. If you do plead guilty, you will give up important rights, some of which are stated below.

First, you give up your constitutional right to a trial by jury or by the court. At a trial the Government would be required to present evidence to prove you are guilty beyond a reasonable doubt. You would have the right to cross-examine the government's witnesses and you could have witnesses come to court and testify for you. You also would have the right to testify if you wanted to; however, if you chose not to present testimony that decision could not be used

against you. You could not be convicted at a jury trial unless all 12 jurors agreed that the government had proved your guilt beyond a reasonable doubt. You could not be convicted in a non-jury trial unless the court found that the government had proved your guilt beyond a reasonable doubt.

Second, you give up the right to appeal your conviction to the Court of Appeals. This is a right you would have if you were convicted following either a jury or non-jury trial. The right of appeal includes the right to have the Court of Appeals appoint a lawyer for you and pay for the lawyer's services to represent you in the Court of Appeals if you could not afford a lawyer.

Third, if you are not a citizen of the United States, your plea of guilty could result in your deportation, exclusion from admission to the United States, or denial of naturalization.

Your signature on this form means that you wish to plead guilty and give up your right to a trial of any kind, and your right to appeal. When your plea is accepted by the court, you will be convicted and the only matter in this case will be for the court to sentence you.

I HAVE REQUESTED THIS FORM WITH MY LAWYER AND HAVE DECIDED TO PLEAD GUILTY IN THIS CASE. I HAVE DECIDED TO GIVE UP MY CONSTITUTIONAL RIGHT TO

A TRIAL AND TO GIVE UP MY RIGHT TO APPEAL.

/s/ John Robertson
Defendant

/s/ James H. Smith #461772
Attorney for Defendant

APPROVED this 28th
day of July , 1999
(Date) (Year)

/s/ David J. Gorman
Assistant U.S.
Attorney or ~~Assistant~~
~~Corporation~~ ~~Counsel~~

/s/ Harold Cushenberry
Judge

White – Court Jacket | Canary – USAO | Pink – Defense Attorney | Goldenrod – Defendant

Form CD-2073/Mar. 99

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA

CRIMINAL DIVISION

UNITED STATES OF AMERICA versus JOHN ROBERTSON, Defendant.	Criminal Action Number F 2056-99

Washington, D.C.

Wednesday, July 28, 1999

The above-entitled action came on for a plea before the Honorable HAROLD CUSHENBERRY, Associate Judge, in courtroom number 312.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS TESTIMONY AND PROCEEDINGS OF THE CASE AS RECORDED.

APPEARANCES:

On behalf of the Government:

DAVID GORMAN, Esquire
Assistant United States Attorney

On behalf of the Defendant:

JAMES SMITH, Esquire
Washington, D.C.

Marian Calhoun (202) 879-1086
Official Court Reporter

[2] THE DEPUTY CLERK: United States versus John Robertson, F 2056-99.

MR. SMITH: Jim Smith for Mr. Robertson.

THE COURT: Good morning.

MR. GORMAN: David Gorman on behalf of the United States.

THE DEFENDANT: Your Honor, John Robertson.

THE COURT: Good morning, sir.

I understand the parties have reached – doesn't look like Mr. Robinson has ever been arraigned, he's simply going to plead guilty to some charge in the indictment.

MR. SMITH: To a lesser charge, attempt aggravated assault.

THE COURT: Is the attempt in the aggravated I assault statute or does it carry some lesser penalty?

MR. GORMAN: Up to five years.

THE COURT: Up to five years?

MR. SMITH: Yes, Your Honor.

THE DEPUTY CLERK: Your Honor, Mr. Robertson is before the Court on a three-count indictment, the first Court charges on or about March 27th, 1999, within the District of Columbia he committed aggravated assault; second count reads: On or about March 27th, 1999, within the District of Columbia he assaulted with a dangerous [3] weapon. The third count reads: On or about March 27th, 1999, within the District of Columbia, assault with a dangerous weapon.

Mr. Robertson, you have a right to counsel. You're not required to make any statements. Any statements made by you may be used against you.

How do you wish to plead?

MR. SMITH: Your Honor, we'll plead to count one. It's my understanding the Government will nollie the other two counts.

THE COURT: Lesser included offense of count one. Not to count one.

MR. SMITH: Exactly, Your Honor. Excuse me.

THE COURT: And what are the other parts of the agreement on your plea to the lesser included offense. Are there other parts?

MR. GORMAN: Your Honor, what we have basically is that we reserve stepback and allocution. I

don't believe papers are applicable, but we waive them if they are. No other parts of the agreement.

MR. SMITH: One moment, Your Honor.

MR. GORMAN: Your Honor, I'm sorry. Mr. Smith has corrected me. There was a second incident that occurred between the two individuals approximately on June 26th, and the Government has agreed not to proceed on any [4] charges on that incident.

THE COURT: What's that date of the other incident?

MR. GORMAN: June 26th, Your Honor.

THE COURT: What year?

MR. SMITH: This year.

THE COURT: Just make sure there's – everyone's rights are protected in case there's ever any breakdown, and have a record of exactly what incident we're talking about and what date it was.

Mr. Robinson, I'm going to place you under oath and ask you a few questions.

(Defendant sworn by Deputy Clerk).

THE COURT: Mr. Robinson, could you state your name and age and tell me how far you went in school.

THE DEFENDANT: My name is John Robertson, I'm 35. I completed high school. And I went to a year of trucking school.

THE COURT: And this morning are you under the influence of any alcohol or narcotic drugs?

THE DEFENDANT: No, sir,

THE COURT: Mr. Robinson, you're currently before the Court charged by way of indictment, which we just arraigned you on, and as to the charges contained in the indictment, you indicated you're not guilty. It's my [5] understanding now you wish to change your plea and admit your guilt to attempted aggravated assault, which is a lesser included offense of the first count of the indictment. It's been placed on the record the promises the Government has made to you.

Do you wish do admit your guilt to that offense based upon the plea bargain, sir?

THE DEFENDANT: Yes, sir.

THE COURT: And what is your understanding of the maximum sentence the Court could impose to the offense of attempted aggravated assault?

THE DEFENDANT: It was five years, sir.

THE COURT: That's right. So could be from probation to five years. If I gave you the maximum sentence, it would be twenty months to sixty months. Because of the penalties that are involved for this plea, the penalties of the offense, you have a right to a trial on this charge if you wanted to have

one. There will be no trial proceeding if you plead guilty.

Let me explain to you what your trial rights are. These are the rights you're waiving. You're giving up your right to put the Government to its proof, to have the Government prove your guilt beyond a reasonable doubt as to each and every element of this offense of attempted aggravated assault.

[6] At a trial proceeding, to establish your guilt the Government would call witnesses and be sworn to tell the truth. They'd introduce all the relevant evidence they had to a trier of fact, in this case the jury, to try to prove your guilt to this offense, and by establishing beyond a reasonable doubt.

At a trial proceeding you'd have a right to challenge the Government's proof that they could establish your guilt by that standard through the cross-examination of Government witnesses by your lawyer. Because there will be no trial proceedings, no Government witnesses will testify. So you're giving up your right to confront or challenge the Government's proof which they believe would establish that you committed this particular criminal offense. You're likewise giving up your right to remain silent in the face of the Government's accusation that you committed a crime.

In a trial proceeding you wouldn't have any obligation to do anything. The Government who charged you with the crime has the burden of proving that you did that. You don't have to prove anything.

The Government has to prove you guilty beyond a reasonable doubt. And they can't compel you to say anything which may make you incriminate yourself. Pleading guilty means giving up your right to be free from self-incrimination.

[7] Because I place you under oath, by the oath you have taken to speak truthfully, you'd be compelled to be a witness against yourself and admit to me out of your own mouth you committed this crime. No one could force you to do that at a trial.

You're also giving up your sixth amendment right to put on a defense to these charges if you thought you had a defense to this charge. You could have testified yourself in support of any offense you thought you might have. You could have others come down here and testify if they had testimony which would support any offense you have. You'd also have the right of compulsory process to subpoena for defense witnesses. If you had a witness who had important information which would support your defense and you wanted that person to testify, that person or persons could be arrested to make sure of your right to put on a defense was honored.

Because there will be no trial proceedings, you won't be testifying, nor would anyone ever testify for any defenses you may have to this charge because you plead guilty and take advantage of this plea bargain.

Finally, you're giving up what we call appellate rights by pleading guilty. Had you gone to trial and

been convicted by a jury of your peers, you'd have a right to have another group of judges evaluate whether the trial [8] judge, myself, and any other trial judge on this bench made serious mistakes during the course of your trial.

During the course of your trial there would be a Court Reporter present, as we have one here this morning, and he or she would be taking down verbatim everything that happened through the course of this trial. One of the things that would be recorded is any objections your lawyer made to legal decisions made by the trial judge, and after the trial, if you're convicted, you could appeal your conviction to the highest court in this jurisdiction, which is the District of Columbia Court of Appeals. If you couldn't afford an attorney for appeal, one would be provided for you.

If on consideration of any claimed errors that was brought to the highest court's attention, the judges on that court concluded that you didn't get a fair trial, that your substantial rights were violated, the trial judge did a very serious mistake, they would reverse your conviction, you'd get another trial that would be free from those errors.

In addition to all the other trial rights, you can't appeal anything at all unless the judge does something illegal. If the judge broke the law in any way, obviously you could always appeal that. Speaking about myself in the third person.

[9] Mr. John Robinson, did you understand all the trial rights you just heard, sir?

THE DEFENDANT: Yes.

THE COURT: Do you understand by pleading guilty you'd be giving up all those trial rights?

THE DEFENDANT: Yes.

THE COURT: Has anyone forced you or threatened you to plead guilty?

THE DEFENDANT: No, sir.

THE COURT: Has anyone made any promises other than the plea agreement placed on the record?

THE DEFENDANT: No.

THE COURT: Are you satisfied with the services of your lawyer?

THE DEFENDANT: Yes.

THE COURT: Have you had enough time to think about your decision to admit your guilt and discuss that decision with your attorney?

THE DEFENDANT: Yes.

THE COURT: Listen to the statements made by the prosecutor, the Assistant United States Attorney. He'll tell me what he believes the evidence would have shown beyond a reasonable doubt to establish your guilt of this offense.

When the prosecutor finishes his statement, I'll [10] ask you if that is correct. If you agree it is, and there's a factual basis for your plea, and you wish to admit you have committed the crime of attempted aggravated assault, I will accept your guilty plea.

MR. GORMAN: Thank you, Your Honor. Had this matter gone to trial, the Government would have shown beyond a reasonable doubt that on March 27th, 1999, at approximately 3 to 3:30 pm at [Home Address Omitted] NE here in the District of Columbia the defendant John Robertson and his girlfriend Watkeena (phonetic) Watson got into a verbal disagreement at Ms. Watson's home. Also home at the time was Ms. Watson's mother.

The argument that occurred between the two turned physical, at which time the defendant struck Ms. Watson, Watkeena Watson approximately 20 to 30 times during an altercation, during the fight. The defendant hit Ms. Watson with his fists, kicked her with his shoes, and the blows landed to her head, her upper body, causing the following injuries. She has a broken bone in her nose, a hole in her sinus area.

There was immediate damage to one of her eyes; the retina was damaged. While it's healing right now, there's no indication that it will necessarily be one hundred percent healed. And her vision was impaired. From that is a severely swollen eye, a broken lip, [11] numerous lacerations and bruises about her body.

A 911 call was placed – actually, two 911 calls placed by the complainant from the address, at which time the police officers from the Metropolitan Police Department came to the address, interviewed those people present, including the defendant. And the defendant admitted hitting Ms. Watson, although he stated that it was because she pushed him first.

After interviewing everyone, the defendant was placed under arrest and transported to the 6th District for processing.

THE COURT: Mr. Robinson, to establish your guilt to this offense the Government would have to prove beyond a reasonable doubt that you on or about March 27, 1999, within the District of Columbia you attempted to cause serious bodily injury to the complainant in this case. That you did so knowingly and purposely, and that you did so without acting in reasonable self-defense.

You heard what the Government said its evidence would show. That attempting to cause serious bodily injury as originally defined by the Court of Appeals, and I believe that the definition which they took from our sex offense statute is broad enough to cover what you attempted to do in this case.

So I'm prepared to accept your guilty plea if [12] you're willing to admit the Government's evidence is accurate, sir, with respect to your conduct in this case.

MR. SMITH: Your Honor, the only thing Mr. Robertson would say is that he doesn't agree that it was to the severity as far as the kicking. That's one of the reasons we didn't plead to ADW, shod foot. But that there is a factual basis for the assault, the attempted aggravated assault.

THE COURT: That's fine.

Mr. Robertson, you're willing to admit to what then? What are you willing to admit to, sir? What did you attempt to do or what were you doing?

THE DEFENDANT: Yes, sir. When I struck her I hit her in the eye.

THE COURT: How many times did you hit her?

THE DEFENDANT: I hit her once in the eye. I swung back and hit her in the eye. I had no intent to do that much damage, but I swung back and hit her in the eye.

THE COURT: In response to what, sir?

THE DEFENDANT: Oh, it was an argument that occurred. And it wasn't that she pushed me. She punched me also. She just didn't push me. She punched me and I punched her back.

THE COURT: I'm not going to accept your guilty plea then. These are very severe injuries that this woman [13] suffered and you're telling me that you responded reasonably to a punch in the eye with – that she punched you and you responded

proportionately, then you have a claim of self-defense. And I'm not going to accept your plea.

If you're not going to admit more than that, you ought to go to trial.

MR. SMITH: Your Honor, I think that in talking with him, he agrees that the punch was more than what was reasonable and proportional. That his punch was obviously far stronger than her punch, and that he admits that he caused the damage that the Government has the evidence on. And that's why we're here with this plea today. He understands that self-defense is limited and that his response was not proportional to what she did to him.

THE COURT: Where did she hit you and how big is she?

THE DEFENDANT: She's – she weigh 200.

THE COURT: Where did she hit you?

THE DEFENDANT: She hit me in the left side jaw.

THE COURT: Sir, if you're not going to admit to any more than that, I'm not going to accept your guilty plea because you have significant exposure of criminal punishment, and I'm not going to accept your guilty plea given what the Government said its evidence would show as [14] to the damage that she suffered if you're telling me that you did nothing but hit her one time after she hit you flush in the jaw.

That's just not credible to me and I'm not going to accept your guilty plea because you're not admitting anything near what I think is required to accept your plea in this case. That's all you're willing to admit, we can set a trial date.

I'll pass the case. You can talk to him. You're not willing to admit more than that, then fine; go to trial.

MR. SMITH: Your Honor, I think he's willing to admit to more than that.

THE COURT: You need to talk to him.

Tell me something.

THE DEFENDANT: Your Honor, it went a little further than that. We was – I was trying to leave and she had pulled a knife and I had like hit her like twice, trying to get the knife from her.

MR. SMITH: Your Honor, the knife incident occurred after all the hitting occurred. That's –

THE COURT: So what happened? After you hit her in the eye.

THE DEFENDANT: After I hit her I was trying to leave and she pulled a knife. And I hit her some more.

[15] THE COURT: And then did she finally drop the knife and you continue to hit her?

THE DEFENDANT: No. No, sir.

THE COURT: How many times did you hit her?

THE DEFENDANT: I hit her two more times.

THE COURT: Where did you hit her?

THE DEFENDANT: Trying to get the knife.

THE COURT: Where did you hit her?

THE DEFENDANT: I hit her in the chest area.

THE COURT: With your fist?

THE DEFENDANT: Yes, sir.

THE COURT: And she wasn't able to hold the knife then after you hit her in the chest.

THE DEFENDANT: No, she dropped the knife then.

THE COURT: And you hit her.

THE DEFENDANT: At the same time.

THE COURT: And what happened after that? You were still made [sic], weren't you?

THE DEFENDANT: I was still mad. I was trying to leave. She took the key out the door and everything; locked me out.

THE COURT: And after she got the knife I assume you were still angry.

THE DEFENDANT: I was mad, sir.

THE COURT: So you continued to hit her, didn't [16] you?

THE DEFENDANT: Yes, sir.

THE COURT: How do you wish to plead to the charge of attempted aggravated assault, guilty or not guilty?

THE DEFENDANT: I'm guilty.

THE COURT: Court finds there's a factual basis for the plea. It's been entered knowingly, intelligently, and voluntarily. Mr. Robinson has admitted sufficient admissions for me to conclude that he committed this offense of attempted aggravated assault.

I have a written waiver of your right to have a trial. The written waiver bears your signature. Did you sign the written waiver, Mr. Robinson?

THE DEFENDANT: Yes, sir.

THE COURT: Written waiver has also been signed by your attorney and by the Assistant United States Attorney, and the Court will approve the written waiver and make a finding based upon the questions I've asked Mr. Robinson and based upon your responses to the Court's questions that he's made and intentional relinquishment of his 6th amendment right to have trial.

You're going to have to pay five hundred dollars that goes to a fund for victims of crime on or before the date of sentencing. Do you understand, sir?

* * *

[LOGO]

GEORGETOWN UNIVERSITY LAW CENTER

Criminal Justice Clinic
Prettyman/Stiller
Fellowship Program

Dean
Judith Areen

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Corinne J. Sumpter

September 14, 1999

The Honorable Harold Cushenberry
Associate Judge
Superior Court of the District of Columbia
500 Indiana Avenue, NW
Washington, D.C. 20001

RE: United States v. John Robertson
F-2056-99
Sentencing: September 10, 1999

Dear Judge Cushenberry:

Please consider this letter as an addendum to our memorandum in aid of sentencing on behalf of John Robertson filed with the Court on September 9, 1999.

When Mr. Robertson reported to this Court for sentencing on September 10, 1999, at 9:30 a.m., Assistant United States Attorney David Gorman gave undersigned counsel a six page victim impact statement from the complaining witness, Wykenna Watson. The statement was prepared with the assistance of Marcey Rinker, victim's advocate with the U.S. Attorney's Office. I was also handed a photocopy of a letter from Ms. Watson's mother, Jacqueline Watson. Additionally, the issue of Mr. Robertson having left the half-way house 6 days before sentencing arose. Since both of these issues arose after our first sentencing memorandum was submitted to the Court, we believe it necessary to submit this additional information in response.

The Complaining Witness' Victim Impact Statement

After reading the Ms. Watson's Victim Impact Statement, undersigned counsel was struck by the variance of the information presented with Ms. Watson's prior sworn testimony about her situation prior to and following the incident. Additionally, Ms. Watson's portrayal of an incident which occurred on June 26, 1999 – an incident which the Government, as part of the plea agreement, agreed not to prosecute – is at variance with the statements about that incident given to undersigned counsel and AUSA Gorman by an unbiased witness.

* * *

However, there was a witness to this event that both Mr. Gorman and investigators working for undersigned counsel have talked with about this incident on June 26, 1999, whose recollection of the event is vastly different from the Ms. Watson's – Ms. Vallace Player of * * * This second incident occurred at Ms. Player's residence. * * *

* * *

Mr. Robertson was offered and he accepted a plea agreement with the government on July 18, 1999. The sequence of events leading to Mr. Robertson's plea agreement shed significant light on this June 26, 1999 incident. On June 30, 1999, undersigned counsel received a call from Mr. Gorman, extending a plea offer prior to indictment for the March 27 incident. In exchange for a plea of guilt to attempt aggravated assault, the government would not indict Mr. Robertson for Aggravated Assault, ADW-Shod Foot, and ADW Knife. I was told the offer would expire on July 8, 1999. When undersigned counsel called Mr. Gorman on July 8 to accept the plea, Mr. Gorman told me that the offer was being withdrawn due to "another incident which occurred a couple of weeks ago, involving him throwing Draino on Ms. Watson." He also told me that there would likely be an indictment for the new incident, in addition to the other indictments.

Sometime after July 8, 1999, Ms. Player was interviewed both by undersigned counsels' staff, and by Mr. Gorman. Indeed, Ms. Player was subpoenaed

to appear before the Grand Jury about this incident; she responded to the subpoena and was interviewed by Mr. Gorman. Following that interview, Mr. Gorman told Ms. Player that she would not be needed for the Grand Jury and was sent home. On July 18, 1999, after Mr. Gorman had spoken with Ms. Player, he called undersigned counsel and re-extended the original plea offer. Mr. Gorman even added another element to the offer: the government would also agree not to pursue charges against Mr. Robertson for the June 26 incident.

Ms. Watson's version of this incident portrays a grisly act of wanton violence. Undersigned counsel does not presume to speak for Mr. Gorman; but it is doubtful that the plea offer would have been re-extended if Mr. Gorman thought that Ms. Watson's version of the June 26 incident would have been perceived as credible by a fact-finder. This sequence of events leads to the inevitable conclusion that having heard the only unbiased witness' statement (that of Ms. Player), the government recognized there was no case against Mr. Robertson. Any injuries Ms. Watson received on June 26 were due to her own actions, and pursuing an indictment for Mr. Robertson's attempt to protect himself from her attack was not in the best interests of justice.

Mr. Robertson does not deny that Ms. Watson suffered injuries in the incident on March 27, 1999, and those injuries were caused by his actions. He acknowledges that those injuries were serious. He agrees that his actions on that day were without legal

justification – and he accepts his responsibility for that incident. But he was not the person who instigated or pursued the violence on June 26, and it would be a grave injustice to hold him accountable for Ms. Watson's actions on that date.

* * *

Respectfully submitted,

/s/ James H. Smith
James H. Smith

/s/ John Copacino
John Copacino
Counsel for John Robertson

cc: David Gorman, Assistant United States Attorney

SUPERIOR COURT OF
THE DISTRICT OF COLUMBIA

United States of America
~~District of Columbia~~

vs.

JOHN ROBERTSON

Case No. F-2056-99

PDID No. 510416

AMENDED

JUDGMENT AND
COMMITMENT/~~PROBATION~~ ORDER

The above-attempted defendant having entered a plea of ☐ Not Guilty ☒ Guilty to the Charge(s) of "F" Attempted Aggravated Assault

and having been found guilty by ☐ Jury ☒ Court, it is hereby ORDERED that the defendant has been convicted of and is guilty of the offense(s) charged, and is hereby SENTENCED to Count "f"

Not less than one (1) year and no more than three (3) years.

The defendant paid $400 toward VVCCA assessment. The defendant has $100 outstanding.

☐ MANDATORY MINIMUM term of _____ applies to the sentence imposed.

☐ MANDATORY MINIMUM term does not apply.

☒ ORDERED that the defendant be committed to the custody of the Attorney General for imprisonment for the period imposed above.

☐ ORDERED that the defendant be committed to the custody of the Attorney General for treatment and supervision by the D.C. Department of Corrections pursuant to Title 24, Section 803(b) of the D.C. Code (Youth Rehabilitation Act 1985).

☐ ORDERED that the defendant be placed on probation in charge of the Director, Social Services Division, and it is further ORDERED that while on probation the defendant observe the following marked conditions of probation:

- ☐ Observe the general conditions of probation listed on the back of this order.
- ☐ Cooperate in seeking and accepting medical, psychological or psychiatric treatment in accordance with written notice from your Probation Officer.
- ☐ Treatment for ☐ alcohol problems ☐ drug dependency or abuse as follows: _____
  _____
- ☐ Restitution of $_____ in monthly installments of $_____ beginning _____ (see reverse side for payment instructions). The Court will distribute monies to _____
  _____
- ☐ _____

Costs in the aggregate amount of $500 have been assessed under the Victims of Violent Crime Compensation Act of 1981, and ☐ have ☒ have not been paid, in total, $100 outstanding.

ORDERED that the Clerk deliver a true copy of this order to appropriate authorized official(s) and that the copy shall serve as the commitment/order for the defendant.

11/15/99	/s/ Harold Cushenberry
Date	Judge

Certification by Clerk pursuant to
Criminal Rule 32(d).

**SUPERIOR COURT OF
THE DISTRICT OF COLUMBIA
DOMESTIC VIOLENCE UNIT**

WYKENNA L. WATSON, Petitioner, v. JOHN E. ROBERTSON, Respondent.	)	IF No. 785-99

AFFIDAVIT OF PETITIONER WYKENNA WATSON IN SUPPORT OF PETITIONER'S MOTIONS TO ADJUDICATE CRIMINAL CONTEMPT AND MODIFY AND EXTEND HER CIVIL PROTECTION ORDER

1. On or about June 26, 1999, at approximately 7:00 p.m. at [Home Address Omitted], the Respondent, John Robertson, harassed me by repeatedly demanding that I drop the criminal charges that were pending against him. Respondent also harassed me by calling me a "ghetto bitch."

2. On or about June 26, 1999, at approximately 7:15 p.m. at [Home Address Omitted], the Respondent pushed me and knocked me into a wall. Respondent proceeded to harass me by repeatedly chanting at me, "Bitch! Bitch!"

3. On or about shortly after midnight on June 27, 1999 at [Home Address Omitted], the Respondent

harassed me by repeatedly shouting at me, "Fuck your mother!"

4. On or about the early morning hours of June 27, 1999 at [Home Address Omitted], Respondent physically attacked me in the living room of the house. I ran to the bathroom to try to escape the Respondent's blows, but the Respondent followed me, trapped me, and repeatedly punched me in the head and face.

5. A short time later, Respondent exited the house at [Home Address Omitted] I went to the screen door at the front of the house, and yelled at Respondent that he was going to jail. While I stood at the screen door, Respondent threw drain cleaner at me, hitting me in my neck and face. As a result, I was admitted into the intensive care unit at Washington Hospital Center for treatment of lye burns and the other injuries caused by the Respondent's attacks on me.

VERIFICATION

District of Columbia, ss:

Wykenna L. Watson, being first duly sworn, states that she is the Petitioner; that she has read and understands the contents of this Affidavit and that it is true to her knowledge or belief.

/s/ Ms. Wykenna L. Watson
Petitioner

Subscribed and sworn to before me this 14 day of December 1999.

/s/ [Illegible]
Notary Public
My Commission Expires 9-14-01

SUPERIOR COURT OF
THE DISTRICT OF COLUMBIA
DOMESTIC VIOLENCE UNIT

WYKENNA L. WATSON, Petitioner,	)	
v.	)	IF No. 785-99
JOHN E. ROBERTSON, Respondent.	)	

MOTION TO ADJUDICATE CRIMINAL CONTEMPT

By Order of this Court dated April 26, 1999, the Respondent was found to have committed an intra-family offense within the meaning of the D.C. Code §16-1001 et seq. (1989) against the Petitioner. Petitioner asserts that Respondent has violated the terms of the April 26, 1999 Civil Protection Order. *See* Affidavit of Petitioner Wykenna Watson in Support of Petitioner's Motions to Adjudicate Criminal Contempt and Modify and Extend her Civil Protection Order.

WHEREFORE, Petitioner respectfully asks the Court to direct that the Respondent appear in Court to answer these charges. Petitioner also asks that, following the hearing, the Court adjudicate the Respondent in contempt of Court and make all further rulings as the Court finds appropriate.

Respectfully submitted,

Robert Rigsby
Acting Corporation Counsel, D.C.

/s/ Angela Harvey
Angela Harvey
Deputy Corporation Counsel
Family Services Division

/s/ Thelma C. Brown
Thelma Chichester Brown
Assistant Corporation Counsel
Domestic Violence Unit

/s/ Kristen Hansen
Kristen Hansen (Bar No. 463101)
Assistant Corporation Counsel
441 Fourth Street, N.W.,
Suite 650N
Washington, D.C. 20001
(202) 442-9751

SUPERIOR COURT OF
THE DISTRICT OF COLUMBIA
DOMESTIC VIOLENCE UNIT

WYKENNA L. WATSON,	)	
Petitioner,	)	
v.	)	IF No. 785-99
JOHN E. ROBERTSON,	)	
Respondent.	)	

MOTION TO MODIFY AND EXTEND CIVIL PROTECTION ORDER AND POINTS AND AUTHORITIES IN SUPPORT THEREOF

By Order of this Court dated April 26, 1999, the Respondent was found to have committed an intra-family offense within the meaning of the D.C. Code §16-1001 et seq. (1989) against the Petitioner. Petitioner asserts that Respondent has violated the terms of the April 26, 1999 Civil Protection Order. *See* Affidavit of Petitioner Wykenna Watson in Support of Petitioner's Motions to Adjudicate Criminal Contempt and Modify and Extend her Civil Protection Order.

WHEREFORE, Petitioner respectfully asks the Court to direct that the Respondent appear in Court to answer these charges. Petitioner also asks the Court to issue a modified and extended Civil Protection Order that, in addition to the existing requirements, orders:

1. That Respondent shall pay for Petitioner's medical bills that resulted from the June 27, 1999 assault Respondent committed against Petitioner.

2. That the Civil Protection Order be extended for a period of 12 months;

3. All further rulings as the Court finds appropriate.

POINTS AND AUTHORITIES
IN SUPPORT THEREOF

D.C. Code Section 16-1005(d) (1997 Repl.)

Respectfully submitted,

Robert Rigsby
Acting Corporation Counsel, D.C.

/s/ Angela Harvey
Angela Harvey
Deputy Corporation Counsel
Family Services Division

/s/ Thelma C. Brown
Thelma Chichester Brown
Assistant Corporation Counsel
Domestic Violence Unit

/s/ Kristen Hansen
Kristen Hansen (Bar No. 463101)
Assistant Corporation Counsel
441 Fourth Street, N.W.,
Suite 650N
Washington, D.C. 20001
(202) 442-9751

SUPERIOR COURT OF
THE DISTRICT OF COLUMBIA

United States of America
District of Columbia

vs.

John Robertson

Case No. IF-785-99

PDID No. 510416

JUDGMENT AND
COMMITMENT/PROBATION ORDER

The above-attempted defendant having entered a plea of ☑ Not Guilty ☐ Guilty to the Charge(s) of

Counts (A) (B) and (E) Contempt

and having been found guilty by ☐ Jury ☑ Court, it is hereby ORDERED that the defendant has been convicted of and is guilty of the offense(s) charged, and is hereby SENTENCED to Count (E) 180 days consecutive to any other sentence being served.
Count (A) 180 days to run consecutive to Count (E).
Count (B) 180 days to run consecutive to Counts (A) and (E). ESS as to Count (B) only 5 years probation with conditions.
stay away & have no contact with Wykenna Watson

☐ MANDATORY MINIMUM term of _____ applies to the sentence imposed.

☐ MANDATORY MINIMUM term does not apply.

☐ ORDERED that the defendant be committed to the custody of the Attorney General for imprisonment for the period imposed above.

☐ ORDERED that the defendant be committed to the custody of the Attorney General for treatment and supervision by the D.C. Department of Corrections pursuant to Title 24, Section 803[b] of the D.C. Code [Youth Rehabilitation Act 1985].

☐ ORDERED that the defendant be placed on probation in charge of the Director, Social Services Division, and it is further ORDERED that while on probation the defendant observe the following marked conditions of probation:

☐ Observe the general conditions of probation listed on the back of this order.

☐ Cooperate in seeking and accepting medical, psychological or psychiatric treatment in accordance with written notice from your Probation Officer.

☐ Treatment for ☐ alcohol problems ☐ drug dependency or abuse as follows: _____

_____

☑ Restitution of $10,009.23 in monthly installments of $166.82 ~~beginning~~ to be paid during 60 month probation period (see reverse side for payment instructions). The Court will distribute monies to _____

_____

☑ Obey CPO in IF 785-99; seek & maintain employment. Pay restitution of $10,009.23 in even monthly payments.

Costs in the aggregate amount of $150.00 have been assessed under the Victims of Violent Crime Compensation Act of 1981, and ☐ have ☑ have not been paid. To be deducted from jail pay.

ORDERED that the Clerk deliver a true copy of this order to appropriate authorized official(s) and that the copy shall serve as the commitment/order for the defendant.

6-14-00	/s/ Linda Davis
Date	Judge Davis

Certification by Clerk pursuant to Criminal Rule 32(d).

6-14-00	/s/ [Illegible]
Date	Deputy Clerk

SUPERIOR COURT OF
THE DISTRICT OF COLUMBIA
FAMILY DIVISION

WAQUINA WATSON, Plaintiff,	:	
v.	:	Action Number IF-785-99
JOHN ROBERTSON, Defendant.	:	

Washington, D.C.

Wednesday, June 14, 2000

The above entitled action came on for a trial before the Honorable LINDA KAY DAVIS, Associate Judge, in Courtroom Number 102.

APPEARANCES:

On Behalf of the Plaintiff:

CHRISTINE HANSEN, Esquire

On Behalf of the Defendant:

JIM SMITH, Esquire

* * *

[7] THE COURT: All right. Then let's move on. I think we might as well take the sentencing first. I have read Mr. Smith's lengthy memo. I assume everybody has read the Presentence Report.

MS. HANSEN: Your Honor, in fact, we did not receive a copy of the Presentence Report and we only received a copy of the memo this morning. I have reviewed the memo briefly but I have not seen the Presentence Report.

THE COURT: It is my practice to have these available up here for counsel. We'll pass this matter so that you can review it. I assume, Mr. Robertson, Mr. Smith, you've reviewed it with Mr. Robertson (indiscernible).

MR. SMITH: I haven't had a chance to review it with him because I only got it from your chambers yesterday afternoon.

THE COURT: Why don't you folks let us know when you're ready to go, okay?

* * *

THE COURT: All right, let the reflect that parties and counsel are now before the Court.

Has everybody now had an opportunity to review both the sentencing memorandum and the pretrial, or the, not the pretrial, excuse me, the Presentence Report.

MS. HANSEN: Yes, Your Honor.

MR. SMITH: Yes, Your Honor.

THE COURT: All right. Then why don't I hear from you, Mr. Smith.

MR. SMITH: Your Honor, as far as the Presentence Report there are two corrections that we would ask be made. On page two, under the prior criminal record, on 3-27-99 assault with a dangerous weapon, gun, Count D, Mr. Robertson has never been charged at any time with assault with a dangerous weapon, gun. But the indictment, a copy of which I have here and I'll be happy to pass it to the Court, that that was assault with a [10] dangerous weapon not – if I may approach, Your Honor? Hand this up to the Court. That's an original of the indictment.

The other correction that we would make to the PSI is on page four. There are two references to Mr. Robertson stating that he had stopped using any drugs in 1987. That date should actually read 1989. Mr. Robertson has repeatedly said, both in this PSI and in the prior PSI before that was done of Judge Cushenberry, that when he went to jail in Virginia back in the late 80's, that all of those charges arose during his drug use. And those, it's obvious from the dates on those charges that, that he using drugs through 1989. So, we would correct that, that part of the PSI.

As far as the other sentencing issues, Your Honor, I know you've had a chance to read the sentence notice. I'm not going to go into great depth in arguing the sentencing here. The short version of it is that Mr. Robertson is, this all happened over a year ago, right at a year ago now, and since that time Mr. Robertson's life obviously has changed pretty dramatically. He has been in prison since September of

1999. And Mr. Robertson has tried to do everything he can in prison to get his life together. He, he had stopped drinking after this incident occurred and has continued, obviously in prison he can't [11] drink, but he's done what he want, what he thinks he should do in order to maintain his sobriety, which is he's gotten involved in the church there, first at Lorton, then at Youngstown, and now back at Lorton. And basically, as they used to say where I come from, he's there every time the doors are open. He goes whenever there is a Christian church service available to him. He's also, both before this incident occurred, since this incident occurred in the prison has tried to avail himself of the Domestic Violence Counseling Program. He signed up for it when he was at Lorton. He was about to get ready to go into it there when he was transferred to Youngstown. He got placed in it in Youngstown at his own request, and was, had just gotten the first two classes done when they shipped him back here in order for him to come before the Court on this hearing here. He knows that it's important that he complete that program. He wants to complete that program.

Mr. Robertson did not intend for anything bad to happen on the night of June 26th and 27th. He recognizes that he made a judgment error in ever having contact with Ms. Watson once the order was issued that he would stay away from her. But he went that day to have time with friends and with Ms. Watson in a friendly manner, and he realizes that that was a mistake and that the result of [12] that mistake is

that somebody that he cared a lot about ended up getting hurt, and that he's have, he's having to face, stand here facing the Court today as a result of what happened.

Your Honor did find that there was not a self-defense, a perfected self-defense claim in the midnight incident. However, I think Your Honor, would take into consideration the mitigating circumstance that once he didn't leave fast enough that he was, he did have some reason to fear that he was subject to injury from all the testimony that Your Honor credited, that Ms. Watson had come at him with a knife and was threatening to kill him. I think Your Honor would also take into consideration the mitigating circumstance that this whole thing is not what you normally see in a criminal contempt of a CPO in that we're usually hear, hearing about how someone forced their way into a house and against someone's will and fought with them. That Mr. Robertson in the early day events that was there at the invitation of Ms. Watson, granted it was not a good judgment on his part to have been there, but, nonetheless, that it was at her invitation. And that when things did get unsettled there that he left and that the later incident that night that Mr. Robertson certainly had no intention of having contact with Ms. Watson that she came back to that, that area and started a fight and [13] introduced this caustic liquid into that incident resulting in the end in some serious injury to Ms. Watson.

And we would ask the Court to look at all those mitigating circumstances and look at the, Mr. Robertson's life history that he had a, he had a drug and alcohol problem early in his life. He resolved that, he went 10 years with nothing on his record and with everyone talking about what a good person he was, what a hard worker he was, what a good father he was to his children before this incident occurred. And we would ask that you look at the entirety of his life and the, all mitigating circumstances of this particular incident, Your Honor. And we would ask that you not sentence him any longer than a 60-day active sentence.

MS. HANSEN: Thank you, Your Honor. In March of 1999 John Robertson committed a serious offense against Waquina Watson and she had to go to the hospital by ambulance from that assault, and after that assault charges were filed against him and she sought a Civil Protection Order which was granted after a hearing by this Court.

We're here today because John Robertson willfully disregarded the terms of that Civil Protection Order. And in doing so he committed serious offenses against the Court's authority and against Ms. Watson's [14] body. The things that we're here about is that he demanded that she drop the criminal charges, so this was not just an invitation that he was there and that nothing happened, that he didn't do anything. He was demanding that she drop the criminal charges that were pending against him, that he pushed her into a wall, the physical assault, and later that night he

threw industrial strength drain cleaner in her face. Ms. Watson described that when that drain cleaner hit her in the face that she felt like her heart stopped beating, that she couldn't see, that she couldn't breathe, and that she thought she was dead. She was taken by ambulance to Washington Hospital Center. She was admitted into the intensive care unit. She was receiving treatment there for several days for the chemical burns and related injuries, including swelling so severe that she could not open her eyes.

After release from the hospital she required subsequent treatment from a general surgeon, from a dermatologist, from an ophthalmologist, from a neurologist, from a dentist, and from a psychiatrist. She has undergone laser surgery to treat the scars on her face and is still undergoing what they call power peels to restore the appearance of her skin. Currently she continues to see those specialists, and on her own she must medicate and treat these injuries. For the burns she [15] must follow an exacting regimen of skin care that includes a facial scrub, face preparations, creams, moisturizers and sun block. Because of the permanent damage to her eyes and her tear ducts she must use drops in her eyes twice a day. Because of the blows to her head she has headaches and must receive injections from a neurologist to treat them. She has jaw pain so that she must take muscle relaxants and ibuprofen, and in addition she must follow a nonchewing diet at this time. Psychologically this has a huge toll on her. She takes anti-depressants, she

suffers from post-traumatic stress disorder, panics, nightmares.

As a result of this we would ask the Court to impose the maximum jail sentence for each of the counts.

And at this time Ms. Watson would like to speak directly to the Court.

THE COURT: All right, Ms. Watson.

THE PLAINTIFF: Thank you, Judge Davis. I would just like to say that I don't really feel that any woman or any human being should be abused by anyone, whether if somebody verbally provoked them or anything. I don't feel as though that people should be abused by a male or female. It's wrong.

What Mr. Robertson has done to me it has changed my life drastically. I have been totally shut down for [16] one year. I have doctor's appointments every day of the week. I have medicine I have to take two and three times a day. I don't sleep well. I mean, physically and mentally it has really taken a toll on me. I did not ask for this. Nobody asks for anything like this.

I hope that Mr. Robertson gets what he deserves, but I feel as though that no punishment is good enough for Mr. Robertson for what he did to me. And I would just like the Court to do what's needed for him to be sentenced properly for this crime by him violating the CPO order and throwing drain opener on

me the way he did and damaged me. And it could be possibly for life. I don't know.

THE COURT: In addition to asking for the maximum penalty then, is the Government asking for restitution?

MS. HANSEN: Your Honor, we've formally asked for the restitution in the modified and extended Civil Protection Order. And that's where we made the request, however, we certainly, whether it be done through the contempt proceeding or through the modification of the Civil Protection Order, we do think that a restitution is appropriate. And that total came to just over $10,000, and we would ask that that be made through the Criminal Finance Office to the Crime Victim's Compensation Program.

THE COURT: Mr. Robertson?

[17] THE DEFENDANT: Yes, good morning. It's, it has been a year and, you know, I, I've been in jail (indiscernible) this year and I've really learned a lot and, you know, I turned my life over to the Lord.

And I'm, I really feel bad about what happened. And the day I went over Mr. Player's (phonetic sp.) house and Ms. Watson, she did ask me to come over. And I was truly wrong for going, but I, I went in peace, and I didn't go to start anything. And then, um, and then I uh, I really forgive Ms. Watson for the false allegations she's thrown on me about the grill incident and things like that.

THE COURT: About what?

THE DEFENDANT: About the grill incident, you know, the false allegations, you know, I really forgive her for that.

And, you know, Ms. Watson is a lady I once loved and we've been through a lot. And I, I never meant to hurt her or anything like that. You know, I wish, uh, that drain cleaner never came about and I never, never meant to throw that. In the morning of June 27th, you know, jealousy and anger really got the best of both of us. I wasn't looking for any trouble. And I know now living out of the will of God trouble can find you. I'm ashamed and disappointed with myself for letting my family [18] down and for letting someone provoke and take me out of my character.

So, put these things behind me and to put a stop to anymore confusion at such time I'm gonna stay in the will of God, continue with anger management and Cage of Rage classes, no more alcohol use, and stay out of the way of Ms. Watson.

So, I'm truly sorry that, um, all this happened, and the last year was a bad year for both of us, both of us, and I, I wish it, you know, had never happened.

THE COURT: Well, I guess the big difference, Mr. Robertson, and I'm sure it's right, it has been a bad year for both of you, in that you have been incarcerated. Of course, Ms. Watson is going to be living with the consequences of your action for the rest of her life. You will eventually be released from jail. And I'm glad that you appear to be doing productive things in jail that you have described and that

your attorney has described. But it is all, it all began because of the assault back in March of 1999. This Court would list one of the reasons we have Civil Protection Orders is when violence occurs in relationships between couples people need to stay away from each other. Now, that order was directed at you, sir, and it was your obligation to stay away from Ms. Watson at all cost. You didn't do so. And then not only [19] did you not do so, you came into yet another very violent confrontation with her. It was she who was taken to the hospital in March of 1999 and it was she, well, not only was taken to the hospital but who spent many long days in the hospital, some of it in intensive care because of your conduct in June of (indiscernible). So, I would suggest to you that it has been a somewhat harder job, a harder year for her than it has been for you. None of which would have ever happened, well, at least the June incident would not have happened had you followed the dictate of the Court's order. And I realize she may have invited you over, you should have known that was (indiscernible).

And I again will acknowledge I think that Ms. Watson did not (indiscernible) well in this situation (indiscernible). I frankly found the behavior of both of you, especially when Ms. Watson returned to the house, to be abominable. But it is the incidents earlier in the day, the willful violation of the court order, first by verbal harassment, entreating Ms. Watson to drop the charges, the beating, and then secondly the assault on that day, and then, of course, finally that most horrific incident where you threw

the acid through the screen door upon Ms. Watson. And your counsel claims, describes it as an imperfect self-defense (indiscernible). Two things, I think Mr. Smith says 10 seconds. I believe [20] (indiscernible) testified there were 12 seconds from the time she got out and looked out the door and you could have been so very far gone by that time.

And I wonder, Mr. Robertson, in all your church going I really do hope you're (indiscernible), what happened in that moment, what level of (indiscernible) did you descend to (indiscernible). I hope in all your church going you find that place and are able to work through that. It is a very egregious incident, that in particular.

With respect to Count 5 I am going to sentence Mr. Robertson to 180 days. That will be consecutive to any other sentence you are serving. In the felony case and Count 5, the incident on the, as listed on the affidavit.

Then with respect to Counts 1 and 2. With respect to Count 1, which in some ways offends me also. It wasn't a, didn't have as significant a physical impact on Ms. Watson, but anybody who tries to get people not to proceed with criminal charges once they have been brought actually could be prosecuted for obstruction of justice. It has a very, very lengthy (indiscernible). I'm going to sentence you also to 180 days on that charge. That again will be consecutive to the (indiscernible).

And with respect to Count 2 I will also sentence [21] you to 180 days. That also will be consecutive to (indiscernible) on the other charges. But I am going to suspend execution within, in Count 2 and I'm going to place Mr. Robertson on a five-year, five-year period of probation. (Indiscernible) that is the maximum period of probation under the law that is allowed.

And I am going to hope that Mr. Robertson is going to show me that he has indeed changed his ways. (Indiscernible) the condition of that probation (indiscernible). So long as you working and regularly paying off that restitution (indiscernible) you can stay on probation, but if you are not working and not paying the restitution you're going to jail.

I assume we'll take care of other kinds on things on the Civil Protection Order.

Is there anything else the Government would be asking?

MS. HANSEN: In the Civil Protection Order or in the –

THE COURT: No, with respect to the Criminal (indiscernible).

MS. HANSEN: No, Your Honor.

THE COURT: All right.

And, Mr. Robertson, with respect to the criminal sentence I want to advise you, sir, you did have a trial [22] in this case so you have a right to appeal the judgment of the Court. That's something your lawyer

can explain to you. But a notice of appeal would need to be filed within 30 days, which you can talk to him about doing that. If you cannot afford a lawyer to represent you on the appeal one would be appointed for you by the Court.

Do you have any questions about any part of the sentence, sir?

THE DEFENDANT: Your Honor, about the part two you was talking about (indiscernible).

THE COURT: You're essentially doing another year on these, on these two charges. And I am also imposing a full 180 days on the, on the additional charge of contempt, but I'm suspending execution of all that time and putting you on a five year period of probation with the condition that you pay $10,000 in restitution. If you don't pay that, and I'm going to put it in even monthly installments to be worked out with your probation officer. Actually your lawyer can go through that. You can, if you'll get those figures to Mr. James, we'll work out the precise amount.

Also, you're going to have to pay $150 to the Victim's Crime Fund. I think I'm just going to order that taken out of your jail pay. All right?

MS. HANSEN: Your Honor, this –

[23] THE COURT: Ms. Hansen, now if we can move on to the Civil Protection Order.

MS. HANSEN: Thank you, Your Honor. And just before, the full amount for the restitution

will be $10,009.23 that's been paid by the Crime Victim's Compensation Program.

THE COURT: $10,009.23?

MS. HANSEN: That's correct, Your Honor.

THE COURT: Okay.

MS. HANSEN: Your Honor, in the Civil Protection Order we're asking that the order be extended for one year from today's date and that it again includes that the respondent not abuse, threaten, harass, or physically abuse Ms. Watson, that he stay at least 100 feet away from her person, home, and work place, that he have no contact with her in any manner. In addition, we have a previous consent agreement that he would pay restitution from her injuries from the March incident and that we'd ask that that continue into this extended order. And I do have an order that's prepared that does replicate that language that's already in the jacket.

THE COURT: All right.

* * *

SUPERIOR COURT OF
THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

UNITED STATES OF AMERICA
DISTRICT OF COLUMBIA

vs.

John Robertson

Case No. IF-785-99

PDID No. 510416

ORDER ASSESSING COSTS

The defendant in the above-entitled matter, having been found guilty on the 11th day of May, ~~19~~ 2000, of 3 Misdemeanor charge(s) and _____ Felony charge(s), is hereby, this 14th day of June, ~~19~~ 2000.

ORDERED to pay the aggregate amount of $150.00 as costs assessed under the Victims of Violent Crime Compensation Act of 1981. Such costs shall be paid today or on or before the TO BE DEDUCTED FROM JAIL PAY day of _____, 19___, the date scheduled for imposition of sentence (payable at the Finance Office of the Superior Court, Room 1225). Said amount is payable to the District of Columbia Treasurer and shall be deposited by the Finance Office to the credit of the Crime Victims' Compensation Fund.

/s/ Linda Davis
JUDGE DAVIS

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA DOMESTIC VIOLENCE UNIT

WYKENNA L. WATSON,	)	
Petitioner,	)	
v.	)	IF No. 785-99
JOHN E. ROBERTSON,	)	
Respondent.	)	

MODIFIED AND EXTENDED CIVIL PROTECTION ORDER

After consideration of the petition originally filed in this case and after a contested hearing held on April 26, 1999, the Court found good cause to believe that John Robertson committed an intrafamily offense against Wykenna Watson within the meaning of D.C. Code Ann. 16-1001 *et seq.*

At a financial review hearing held on January 31, 2000, the parties entered a consent order that addressed restitution and modified the terms of the April 26, 1999 civil protection order. At what became a status hearing on April 4, 2000, the parties agreed to extend the modified April 26, 1999 order until May 30, 2000.

After a contested hearing on Petitioner's Motions to Modify and Extend and Petitioner's Motion to Adjudicate Criminal Contempt on May 10, 2000, the

Court found good cause to modify and extend the civil protection order. Therefore:

IT IS HEREBY ORDERED that for 12 months from the date of this Order:

1. No Abuse

The Respondent shall not assault, threaten, harass, or physically abuse Petitioner in any manner.

2. Stay Away

Respondent shall stay at least 100 feet away from Petitioner's person, home and workplace.

3. No Contact

Respondent shall not contact Petitioner in any manner. This includes but is not limited to contact by telephone, in writing, and in any other manner, either directly or indirectly through a third party.

4. Restitution

A. *Petitioner's Injuries from March 1999 Assault*: Payment of [$]257.52 is due no later than 60 days after Respondent's release from jail. Respondent shall make payment by money order, and the money order shall be made payable to Wykenna Watson. Respondent will provide the money order to his attorney, James Smith, who will in turn provide it to

Petitioner's attorney, Kristen Hansen. Ms. Hansen shall forward the money order to the Petitioner.

~~B. *Petitioner's Injuries from June 1999 Assault*: Respondent shall pay $10,009.23 in restitution to the Crime Victims Compensation Program. Payments shall be made through the criminal finance office.~~

C. Respondent's failure to pay restitution in full shall serve as a basis for requesting an extension of this Order.

5. Counseling

A. Respondent shall enroll in and complete a counseling program for domestic violence.

B. Respondent shall enroll in and complete a counseling program for substance abuse.

C. Respondent must enroll in these programs through the Probation Department, Room 4206 of the D.C. Superior Court, no later one week after his release from jail.

D. Respondent's failure to enroll in and successfully complete either counseling program shall serve as a basis for requesting an extension of this Order.

6. Full Faith and Credit

A. The Superior Court of the District of Columbia determined that it had jurisdiction over the parties and the subject matter under the laws of the District of Columbia.

B. Respondent was given reasonable notice and opportunity to be heard sufficient to protect his right to due process before this Modified and Extended Order was issued.

C. The Order was issued in accord with the requirements of the Full Faith and Credit Provision of the Violence Against Women Act; Title IV, Subtitle B, Chapter 2 of the Violent Crime Control and Law Enforcement Act of 1994. 18 U.S.C. § 2265.

D. The Order shall be presumed to be valid and enforceable in the District of Columbia and all other U.S. jurisdictions, including Maryland and Virginia. *See* MD. CODE ANN. FAM. LAW § 4-508.1(b)(2) and VA. CODE ANN. §16.1-279.1(E).

Respondent MUST notify the court
if he has a change of address at any time

ANY AND EVERY FAILURE TO COMPLY
WITH THIS ORDER IS PUNISHABLE AS
CRIMINAL CONTEMPT AND/OR AS A CRIMINAL
MISDEMEANOR AND MAY RESULT IN
IMPRISONMENT FOR UP TO SIX MONTHS,
A FINE OF UP TO $1,000, OR BOTH.

/s/ Linda Davis _____ 6/14/00
Judge's Signature Date

On the date shown below, a copy of this order was served personally on all parties who have been ordered to comply with any provision of the order.

Deputy Clerk Date

DECLARATION OF JAMES H. SMITH, ESQ.

I, James H. Smith, Esq., declare as follows:

1. I represented James Robertson in Case Nos. F-2056-99 and IF-785-99 in the District of Columbia Superior Court. At the time of this representation I was a graduate fellow at the Georgetown University Law Center, working as a supervising attorney in the Georgetown Criminal Justice Clinic.

2. On the behalf of Mr. Robertson, I negotiated a plea agreement with the government in F-2056-99. The agreement reached with the government in F-2056-99 is reflected on the "Waiver of Trial" form, signed by all parties: in exchange for Mr. Robertson entering a plea of guilty to one count of attempt aggravated assault, the government agreed to dismiss the greater charge of aggravated assault and two counts of assault with a dangerous weapon, would not pursue any charges concerning an incident on June 26, 1999, and would reserve its right to allocute regarding "step-back" and sentencing.

3. It was my understanding that upon the court's acceptance of Mr. Robertson's plea, Mr. Robertson would face no criminal prosecution for the events of June 26, 1999. I communicated this understanding to Mr. Robertson prior to his signing the plea agreement.

4. After the District of Columbia Office of Corporation Counsel filed a motion to adjudicate criminal contempt in the intra-family case, I met with my

supervisor at the Georgetown Criminal Justice Clinic, John Copacino, and discussed the possibility of filing a motion to dismiss, in light of the government's agreement not to prosecute Mr. Robertson for the June 26, 1999 incident. After that meeting, I conducted legal research to assess the viability of our claim. Although I have do not recall the particular legal research I conducted, my notes of the meeting with Mr. Copacino lead me to believe I focused on the general topics of "double jeopardy" and "dual sovereignty."

5. I did not file a motion to dismiss. Although I do not recall precisely why I came to that decision, I believe the decision was informed by the legal research I conducted, and that I came to believe that a motion to dismiss would not be successful. I know that the decision not to file a motion to dismiss was not a strategic or tactical decision, as my client had every interest in avoiding criminal prosecution for an event that we believed was covered by the terms of his plea agreement.

I state under penalty of perjury that the foregoing is true and correct.

Executed on: 11/4/03 /s/ James H. Smith
James H. Smith
D.C. Bar No. 461772

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division – Domestic Violence Branch

WYKENNA WATSON	)	
	)	
Petitioner	)	
	)	**Docket No. IF-785-99**
v.	)	**Judge Linda K. Davis**
	)	
JOHN ROBERTSON	)	
	)	
Respondent	)	

ORDER

This matter is before the court on the Respondent's Motion to Vacate Convictions and the Petitioner's opposition to the motion. The respondent was convicted of three counts of criminal contempt arising out of an incident occurring on or around June 26, 1999. On July 20, 1999, the respondent, as the defendant in F-2056-99, entered into a plea agreement with the Assistant United States Attorney that included a promise by the AUSA to "not pursue any charges concerning an incident on 6-26-99." The respondent argues that in representing the petitioner in the contempt action, the Office of Corporation Counsel violated the plea agreement entered into by the government in F-2056-99 and thus the contempt convictions should be overturned. The petitioner argues that the Office of Corporation Counsel did not prosecute the contempt charges against the respondent but instead represented the petitioner in pursuing the charges; because the petitioner was not

bound by the plea agreement, argues the petitioner, the convictions should stand. The Court agrees with the petitioner and will deny the Motion to Vacate Convictions.

The respondent relies on *In re Peak*, 759 A.2d 612 (D.C. 2000), in arguing that the petitioner in this case should be bound by the government's promise in F-2056-99. In *Peak*, the Court first found that a conditional plea agreement entered into by a private prosecutor was valid. The Court also found that the trial court was in error in allowing the counsel for the beneficiary of a court order to pursue contempt charges for violation of that order. Neither of these findings provides any support for the respondent's Motion.

The first pending in *Peak* involved the validity of a conditional plea agreement entered into by a private prosecutor in a contempt proceeding. Rule 11(a)(2) of the Superior Court Criminal Rules required that the government consent to a conditional plea agreement. The Court, in interpreting Rule 11(a)(2), found that the conditional plea was valid even though entered into by a private prosecutor and not by the government. The Court found that the language in the Rule referring to "the government" was not intended to exclude a private prosecutor. This was merely the interpretation of a local rule, one that is not relevant to this case.

The second holding in *Peak* was that a disinterested prosecutor is required for a criminal

contempt proceeding arising out of civil litigation. The Court in *Peak* goes on to exclude intrafamily proceedings from this requirement, referring to *Green v. Green*, 642 A.2d 1275 (D.C. 1994). In *Green*, the Court found that in intrafamily cases, the party benefiting from the court order, the petitioner, could pursue criminal contempt charges even though the petitioner is an interested party. Therefore, the second holding in *Peak*, because it does not apply to intrafamily cases, is also irrelevant to this case.

In addition to *Peak*, the respondent relies on *Young* to find backing for its argument. In *Green*, the Court expressly found that the holding in *Young* did not apply to contempt charges arising from intra-family proceedings. Therefore, this Court does not find the language in *Young* persuasive in this case.

The respondent argues that any petitioner in a contempt proceeding represents the sovereign and therefore is the government. In support of this, the respondent relies heavily on the language from *Peak*, 759 A.2d at 620, quoting *Young v. United States*, 481 U.S. 787, 804 (1987) that "[c]riminal contempt proceedings arising out of civil litigation are between the public and the defendant." The respondent refers to this as a "fundamental principle." The respondent's reliance on this language is misguided for two reasons. First, this language was used in *Peak* in finding that a disinterested prosecutor is required for a criminal contempt proceeding arising out of civil litigation. As discussed above, this holding does not apply in this case, nor does the holding in *Young*, the

case from which the quote originates. Second, even if the proceeding in this case is "between the public and the defendant," it does not necessarily follow that the public is the same as the government. There is no indication from any cited authority that a plea agreement entered into by the government is binding on "the public" as a whole, or, in this case, on the private petitioner.

Given the discussion above, this Court finds that the plea agreement in F-2056-99 is binding only on the government and not on any party seeking to vindicate a right against the respondent arising from the events of June 26, 1999. This leaves the Court to decide whether the Office of Corporation Counsel was pursuing the contempt charges as the government or if the petitioner was pursuing them with the Office of Corporation Counsel as her counsel. This case originated on March 29, 1999, when the petitioner, without representation, filed a Petition and Affidavit for Civil Protection Order (CPO.) Counsel for Mr. Robertson entered a praecipe entering an appearance on behalf of the petitioner. The Office of Corporation Counsel subsequently filed the motion for contempt of the CPO on Ms. Watson's behalf in January of 2000. The question before the Court is whether Ms. Watson's representation at that time by the Office of Corporation Counsel changes her "private right of action to enforce the CPO through an intrafamily proceeding," *Green*, 642 A.2d at 1280 n.7, into a prosecution controlled by the government. The Court ultimately concludes that it does not.

The contempt action flows directly from Ms. Watson's privately initiated petition for a CPO. While the Office of Corporation Counsel subsequently agreed to represent her interests before the Court, it was also free to stop representing her. Any withdrawal from representation, however, would not and could not end Ms. Watson's pursuit of the contempt action if she chose to continue with it. Indeed, during this Court's two year assignment in the Domestic Violence Unit, the Office of Corporation Counsel exercised its prerogative to withdraw from representation on several occasions.

In the instant case, this Court concludes that the Office of Corporation Counsel is not acting as a prosecutor but more as an "aid" to the petitioner. What started as a private right to action was not thereby converted into a governmental prosecution, and the private petitioner is therefore not bound by a plea agreement entered into by government prosecutors in another case. Accordingly, it is by the Court this 27th day of August, 2004

ORDERED, that the Respondent's Motion to Vacate Convictions is **DENIED**.

/s/ Linda K. Davis

Linda K. Davis
Judge
Signed in Chambers

ORDER LIST

December 14, 2009

* * *

CERTIORARI GRANTED

* * *

08-6261 ROBERTSON, JOHN V. UNITED STATES, EX REL. WATSON

The petition for a writ of certiorari is granted limited to the following question: Whether an action for criminal contempt in a congressionally created court may constitutionally be brought in the name and pursuant to the power of a private person, rather than in the name and pursuant to the power of the United States.

* * *

PETITIONER'S BRIEF

(4)

No. 08-6261

Supreme Court, U.S.
FILED
JAN 28 2010
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JOHN ROBERTSON,

Petitioner,

v.

UNITED STATES *ex rel.* WYKENNA WATSON,

Respondent.

On Writ of Certiorari to the District of Columbia Court of Appeals

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QUESTION PRESENTED

Whether an action for criminal contempt in a congressionally created court may constitutionally be brought in the name and pursuant to the power of a private person, rather than in the name and pursuant to the power of the United States.

LIST OF PARTIES

Petitioner captioned this proceeding *John Robertson v. United States ex rel. Wykenna Watson*, believing that the criminal contempt proceeding giving rise to this action could only have constitutionally been brought on behalf of the sovereign. The District of Columbia Court of Appeals held that Wykenna Watson, rather than the United States, was the real party-in-interest to the criminal contempt prosecution. The District of Columbia, through the Attorney General for the District of Columbia, participated in this litigation initially, maintaining that it represented Ms. Watson in her individual capacity. Ms. Watson now has private counsel. The United States filed a brief with this Court as *amicus curiae*.

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DECISIONS BELOW

The opinion of the District of Columbia Court of Appeals (Cert. Pet. App. A.) is reported at *In re John Robertson*, 940 A.2d 1050 (D.C. 2008). The order denying rehearing (Cert. Pet. App. B.) is unpublished.

STATEMENT OF JURISDICTION

The District of Columbia Court of Appeals denied rehearing in this case on June 13, 2008. (Cert. Pet. App. B.) Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §§ 1257(a) & (b).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner has set forth the constitutional and statutory provisions involved in this case in his Appendix.

PRELIMINARY STATEMENT

John Robertson was convicted of three counts of criminal contempt in the Superior Court of the District of Columbia for violating the terms of a civil protection order ("CPO"), despite a promise by the United States that he would not be prosecuted for the events which gave rise to the contempt convictions. The District of Columbia Court of Appeals concluded

that no plea breach had occurred, as in its view the criminal contempt proceeding had been maintained not in the name and pursuant to the power of the United States, but rather in the name and pursuant to the power of Ms. Wykenna Watson, the private party who had secured the CPO against Mr. Robertson. The lower court erred in concluding that a criminal contempt proceeding in a congressionally created court constitutionally can be brought in the name and pursuant to the power of a private individual. The judgment must be reversed.

STATEMENT OF THE CASE

On March 29, 1999, Petitioner John Robertson was charged by complaint in the Superior Court, Criminal Division, with one count of aggravated assault for an assault on Wykenna Watson, Mr. Robertson's girlfriend at the time. (J.A. 9.) On the same day, Ms. Watson filed a petition for a CPO against Mr. Robertson in the Superior Court, Family Division, pursuant to the District of Columbia Intrafamily Offenses Act, D.C. Code §§ 16-1001-1006 (1981 & 1998 Supp.). (J.A. 11-17.)

A hearing on the motion was held on April 26, 1999. At that time, an attorney from the Office of the

Attorney General for the District of Columbia[1] "enter[ed] an appearance on behalf of" Ms. Watson. (J.A. 18.)[2] At the conclusion of the hearing, the Family Division judge entered a CPO ordering, inter alia, that Mr. Robertson not contact, assault, threaten, harass, or abuse Ms. Watson. (J.A. 20.)

On July 8, 1999, a grand jury indicted Mr. Robertson for three counts of felony assault based on the March incident. (J.A. 26.) Just prior to the filing of the indictment, the Assistant United States Attorney ("AUSA") who was prosecuting the case extended Mr. Robertson a plea offer. (J.A. 50.) When Mr. Robertson's counsel called to accept, the AUSA informed counsel that he was withdrawing the plea offer in light of an incident that had occurred on June 26, 1999, involving another possible assault by Mr. Robertson on Ms. Watson. The AUSA indicated that he likely would seek an additional indictment against Mr. Robertson for the June 26th incident. (J.A. 50.)

After investigating the June incident, the AUSA decided that the United States would not seek additional charges against Mr. Robertson. (J.A. 51.)

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[1] In 2004, the name of the Corporation Counsel for the District of Columbia changed to the Attorney General. Petitioner uses the "Attorney General" title.

[2] At the time, the Attorney General was authorized by court rule to represent the petitioner whenever a petition for a civil protection order was filed. D.C. Super. Ct. Intra-Fam. R. 9(a)(2). This practice has since been codified by statute. *See* D.C. Code § 16-1003(b) (2001 & Supp.).

Instead, the AUSA re-extended the plea offer, this time promising that if Mr. Robertson entered a guilty plea to one count of attempted aggravated assault with respect to the March incident, the United States not only would dismiss the three indicted charges, but also would agree not to prosecute Mr. Robertson for the events of June 26, 1999. (J.A. 50-51.)

Mr. Robertson accepted this offer and on July 28, 1999, entered a guilty plea to one count of attempted aggravated assault. (J.A. 46.) Pursuant to the plea agreement, the United States dismissed the indicted counts relating to the March incident and promised that the government would not pursue any charges relating to the events of June 26, 1999. (J.A. 33-34.) The terms of the plea agreement were handwritten onto the standard Superior Court "waiver of trial" form, which was signed by the AUSA, counsel for Mr. Robertson, and the judge: "In exchange for Mr. Robertson's plea of guilty to attempted aggravated assault, the gov't agrees to: DISMISS the charges of Agg Assault, ADW knife, ADW. Not pursue any charges concerning an incident on 6-26-99. Reserves step-back & allocution." (J.A. 28.) The judge accepted Mr. Robertson's guilty plea and sentenced Mr. Robertson to a term of imprisonment of not less than one year and not more than three years in prison. (J.A. 53.)

Several months later, Ms. Watson, aided by the Attorney General, filed a "Motion to Adjudicate

Criminal Contempt" in the Family Division case. (J.A. 59.)[3] In her supporting affidavit, Ms. Watson enumerated five actions occurring on the evening of June 26th and into the early morning hours of June 27, 1999, which she alleged constituted violations of the CPO. (J.A. 56-57.)[4] Ms. Watson also filed a motion to modify and extend the CPO based on these events. (J.A. 61.)

On May 10, 2000, a bench trial commenced to resolve both the criminal contempt charges and the motion to modify and extend the CPO. (J.A. 2.) Ms. Watson was represented by an Assistant Attorney General for the District of Columbia throughout the proceeding. (J.A. 2.) At the conclusion of the trial, the Family Division judge adjudicated Mr. Robertson guilty of three of the five counts of criminal contempt for the events of June 26, 1999, acquitting him of two charges. (J.A. 2.) The judge thereafter entered a Criminal Judgment and Conviction Order, sentencing Mr. Robertson to three consecutive 180-day jail terms

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[3] In 1999, D.C. Code § 16-1005(f) (1981 & 1998 Supp.) provided: "Violation of any temporary or permanent order issued under this subchapter . . . shall be punishable as contempt." Court rule provided the penalty: "Contempt may be punished by a fine or penalty of not more than $300.00 or by imprisonment for not more than six (6) months, or both." D.C. Super. Ct. Intra-Fam. R. 12(e).

[4] Ms. Watson subsequently acknowledged in Superior Court that the actions that flowed from the evening of June 26, 1999, into the early morning hours of June 27th were encompassed in the "incident" that the government agreed not to pursue in the plea agreement. (Pet. C.A. App. 45.)

(execution of one count suspended), imposing a five-year period of probation, ordering him to pay court costs to a victim's compensation fund, and requiring him to pay $10,009.23 in restitution as a condition of probation. (J.A. 63-64.)[5]

Mr. Robertson filed an appeal from the judgment of criminal contempt. (J.A. 3.) While his appeal was pending, Mr. Robertson – represented by new counsel – filed a collateral motion to vacate his criminal contempt convictions. (J.A. 3.) In his collateral challenge, Mr. Robertson argued that his criminal contempt prosecution could only have lawfully been maintained in the name of the government, noting it is "beyond dispute that criminal contempt 'is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both.'" (Pet. C.A. App. 31 (citations omitted).) He contended that the prosecution of the contempt was a violation of the United States' agreement not to prosecute him for the events of June 26, 1999, and that in light of the plea breach, the Due Process Clause of the Fifth Amendment to the United States Constitution compelled the court to vacate his criminal contempt convictions. (Pet. C.A. App. 30-38.) He also contended that his trial counsel had been

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[5] The judge also granted the motion to modify and extend the CPO. (J.A. 82.)

ineffective for failing to move to dismiss the criminal contempt charges on this ground.[6]

The Attorney General for the District of Columbia opposed the motion and argued that Mr. Robertson's criminal contempt prosecution had not violated the United States' plea agreement because the action had been maintained in the name and pursuant to the power of Ms. Watson in her "private capacity," rather than in the name and pursuant to the power of the United States. (Pet. C.A. App. 42-46.)[7] The Attorney General wrote that the Assistant Attorney General ("AAG") at the hearing had been representing Ms. Watson, and if the AAG "had determined that the case lacked merit, or for any other reason should not have proceeded, her only recourse would have been to request permission from the court to withdraw. The [AAG] could not have unilaterally dismissed the motion because it belonged to Ms. Watson." (Pet. C.A. App. 43-44.) The judge who had presided over the contempt trial denied Mr.

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[6] Appended to his motion was a declaration from trial counsel, in which counsel stated that his decision not to file a motion to dismiss "was not a strategic or tactical decision, as my client had every interest in avoiding criminal prosecution for an event that we believed was covered by the terms of his plea agreement." (J.A. 88.)

[7] The Attorney General noted that under the statutorily mandated division of prosecutorial authority in the District of Columbia, only the Office of the United States Attorney could have initiated a "government" prosecution for contempt. (Pet. C.A. App. 43 (citing D.C. Code § 23-101 (1981 & 1998 Supp.).))

Robertson's motion to vacate his convictions, agreeing with the Attorney General that the criminal contempt prosecution had been a "private right of action" and that Ms. Watson, as a "private petitioner," was "not bound by a plea agreement entered into by government prosecutors." (J.A. 89-93.) Mr. Robertson filed a notice of appeal, and the appeal from the collateral proceeding was consolidated with Mr. Robertson's direct appeal. (J.A. 4.)

Before the District of Columbia Court of Appeals, Mr. Robertson argued that an unbroken line of precedent from this Court established that criminal contempt prosecutions "are between the public and the defendant, and are not part of the original [civil] cause." (Pet. C.A. Br. 20-21.) He contended that the Council of the District of Columbia could not "abrogate th[is] fundamental constitutional principle." (Pet. C.A. Br. 28.) Because, in Mr. Robertson's view, his criminal contempt prosecution only could have lawfully been brought in the name and pursuant to the power of the United States, the prosecution constituted a breach of the plea agreement and due process required that his convictions be vacated. (Pet. C.A. Br. 34-35.)

The Attorney General filed a brief in opposition, again relying primarily on the argument that the contempt prosecution had been brought in the name and interest of Ms. Watson, rather than in the name

and interest of the United States. (Resp. C.A. Br. 14.)[8] During the course of the litigation, the court of appeals invited the views of the United States. (J.A. 5.) The United States filed a brief, contending that the contempt case brought against Mr. Robertson was a "private action for criminal contempt brought by Watson in her own name and interest" (U.S. C.A. Br. 21), and that "criminal contempt prosecutions under D.C. Code § 16-1005(f) may lawfully be conducted as private actions." (U.S. C.A. Br. 9.) It relied on local precedent to contend that "such prosecutions are constitutional." (U.S. C.A. Br. 4.) In the view of the United States, because the contempt prosecution had not been brought in the name or pursuant to the power of the United States, the plea agreement had not been breached. (U.S. C.A. Br. 5-6.)

In an opinion issued on January 24, 2008, the court of appeals affirmed Mr. Robertson's convictions. (Cert. Pet. App. A.) It concluded that § 16-1005(f) authorized the beneficiary of a civil protection order to bring a criminal contempt action in her own name, "rather than in the name of the sovereign." (Cert. Pet. App. A.15.) The court recounted that "Mr. Robertson describe[d] the contempt proceeding brought against him . . . as a 'criminal action,'" and that he "assert[ed]

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[8] Contrary to its position in the trial court, *see supra* n.7, the Attorney General argued that if the court concluded that the criminal contempt prosecution had not been brought in Ms. Watson's name, it should find that the action had been maintained in the name of the District of Columbia. (Resp. C.A. Br. 18.)

that such an action could only be brought 'in the name of the relevant sovereign,'" in this case "'the United States.'" (Cert. Pet. App. A.14.) The court found, however, "that Mr. Robertson's characterization of the proceeding against him lo[st] sight of the special nature of criminal contempt." (Cert. Pet. App. A.14.) Quoting from Justice Blackmun's dissenting opinion in *United States v. Dixon*, 509 U.S. 688, 742 (1993), the court stated that "criminal contempt is 'a special situation'" and a "'court [] enforcing obedience to its orders by proceedings for contempt [] is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to.'" (Cert. Pet. App. A.14 (citations omitted).) The court therefore held that, under § 16-1005(f), "a criminal contempt proceeding is properly brought in the name of a private person . . . rather than in the name of the sovereign," and concluded that the action brought in Ms. Watson's "name and interest" was not barred by the United States' promise not to prosecute Mr. Robertson for the events of June 26, 1999. (Cert. Pet. App. A.15, 19.) The court denied en banc review. (J.A. 8.) On December 14, 2009, this Court granted Mr. Robertson's petition for a writ of certiorari. (J.A. 94.)

SUMMARY OF ARGUMENT

The Framers of our Constitution employed terms such as "crimes," "offenses," "criminal cases," and "criminal prosecutions" with the understanding,

grounded in both English and Colonial common law, that a "crime" is a "public wrong," "a breach and violation of the public rights and duties, due to the whole community, considered as a community, in it's [sic] social aggregate capacity." William Blackstone, 4 *Commentaries* *5 [hereinafter 4 *Commentaries*]. In England, the Crown was "in all cases the proper prosecutor for every public offense," 4 *Commentaries* *2; upon the Revolution, the United States became the proper prosecutor for every public offense against it. Therefore, at root, there are two parties to a criminal action in our system: the government and "the individual whom [it] seek[s] to punish." *United States v. Ortega*, 24 U.S. (11 Wheat.) 467, 469 (1826).

The Framers' assumption that criminal actions would be brought in the name of the sovereign is evident not only from the settled meaning circa 1787 of the concept of "crime," but further from the Framers' insistence that felonies be indicted by grand juries, offenses be amenable to pardon by the President, and persons not be subjected to jeopardy twice for the same offense. These required accoutrements of criminal actions under our Constitution are incompatible with the only historical action in the English common law whereby a private party actually could prosecute "crime" and obtain punishment in such party's own name: the anachronistic private "appeal of felony." In addition to being inconsistent with the procedural requirements placed by the Framers into the Constitution, the appeal of felony was in virtual disuse in England by the 1780s and – more importantly – apart

from one pre-Revolutionary case involving the hanging of a slave in Maryland, was "never adopted here." *State v. Gerry*, 38 A. 272, 273 (N.H. 1896). Our Constitution does not admit of a prosecution maintained in the name and power of a private person. Rather, as the text and history of the Constitution and this Court's jurisprudence demonstrate, a "crime" is a public wrong and a "criminal prosecution" may be constitutionally prosecuted only by the sovereign in whom the public has entrusted this power.

The same is true for criminal contempt, which is a "'crime in the ordinary sense.'" *United States v. Dixon*, 509 U.S. 688, 696 (1993) (citations omitted). Whether a contempt proceeding is criminal or civil depends on the "character and purpose" of the remedy imposed. *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911). Here, where Mr. Robertson was sentenced to multiple fixed terms of incarceration, the proceeding was most decidedly criminal. Criminal contempt, like all other crime, is a public wrong. "If such acts are not criminal, we are in error as to the most fundamental characteristics of crimes as that word has been understood in English speech." *Gompers v. United States*, 233 U.S. 604, 610 (1914). Because criminal contempt prosecutions are "crimes in the ordinary sense," brought to vindicate the authority of public institutions, they are necessarily brought on behalf of the sovereign; they are "between the public and the defendant." *Gompers v. Buck's Stove & Range Co.*, 221 U.S. at 445. Since, as understood by the lower court, the criminal contempt

prosecution against Mr. Robertson was brought in the name and pursuant to the power of Respondent Wykenna Watson, the prosecution was "as fundamentally erroneous as if in an action of 'A vs. B, for assault and battery,' the judgment entered had been that the defendant be confined in prison for twelve months." *Id.* at 449. This Court's contempt jurisprudence demonstrates that a criminal contempt proceeding, as with any criminal action, must be brought in the name and interest of the sovereign.

This Court tolerates limited intrusions into traditional notions of separation of powers and due process in criminal contempt proceedings because of the doctrine of necessity. The criminal contempt power rests upon the need of public institutions to vindicate their authority. Because a court cannot be at the mercy of another branch of government when its dignity is at stake, it can appoint a private prosecutor to initiate a contempt proceeding when the Executive declines to do so. Such a system intrudes into traditional separation of powers principles, as does a criminal prosecution for violation of a judicial order, rather than a legislatively enacted code. Also, because courts must sometimes act quickly to quell disturbance or disrespect, some criminal contempt prosecutions proceed without traditional due process protections. But necessity is a limiting principle as well. Courts must exercise "*the least power adequate to the end proposed.*" *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821). Here, Mr. Robertson was prosecuted for violation of a judicial order in a case

over which the Executive could exercise no control, after the Executive had demonstrated that it had no interest in prosecuting the case, by a private party who had no obligation to ensure "that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). Such a prosecution, neither justified by the doctrine of necessity nor limited by the principle of restraint, does not comport with the Constitution.

ARGUMENT

I. THE HISTORY AND TEXT OF THE CONSTITUTION DEMONSTRATE THAT CRIMES ARE "PUBLIC WRONGS" AND THAT THE ONLY CRIMINAL PROCEEDING CONTEMPLATED BY THE CONSTITUTION IS ONE BROUGHT IN THE NAME OF THE SOVEREIGN.

A congressionally created court tried, convicted, and imprisoned Mr. Robertson for criminal contempt in a proceeding where a private person pursued a private cause of action on her own behalf. This was not the type of prosecution leading to criminal punishment envisioned by the Constitution. The many references in the Constitution to crimes, offenses, criminal cases, and criminal prosecutions[9] reflect

[9] *See, e.g.*, U.S. Const. art. III, § 2, cl. 3 ("Crimes"); *id.* at art. IV, § 2, cl. 2 ("Crime"); *id.* at amend. V ("crime"); *id.* at amend. VI ("crime"); *id.* at art. II, § 2, cl. 1 ("Offenses"); *id.* at

(Continued on following page)

settled common-law principles and definitions entirely familiar to the framing generation: crimes are public wrongs, visited with punitive sanctions for their violations and prosecuted by and in the name of the sovereign, which is considered the injured party in all criminal cases. The Constitution and the Bill of Rights constrain the exercise of governmental power in criminal prosecutions and rest on the axiomatic assumption that there are two parties in criminal prosecutions – the government and the person accused. The Constitution leaves no room for the exploitation of federal power to construct an alternative universe in which persons lose their liberty in criminal prosecutions of a type never contemplated by the Framers.

The "language of the Constitution . . . could not be understood without reference to the . . . common law, the principles and history of which were familiarly known to the framers of the Constitution." *Schick v. United States*, 195 U.S. 65, 69 (1904) (citations omitted). The Framers understood, as Blackstone explained, that in civil society, the individual's "right of punishing crimes against the law of nature" "is transferred from individuals to the sovereign power." 4 *Commentaries* *7-8; *see also* 2 John Locke, *Two Treatises of Government* 180-81 (12th ed. 1827) (1690) ("[E]very man who has entered into civil

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amend. V ("offence," "criminal case"); *id.* at amend. VI ("criminal prosecutions").

society, and [ha]s become a member of any commonwealth, has thereby quitted his power to punish offences against the law of nature, in prosecution of his own private judgment."). Crime, at that point, is properly understood as a breach of the public good.

The common-law commentators consistently described crime by reference to its public nature, often simultaneously contrasting it to its civil counterpart. Again, in Blackstone's words:

> The distinction of public from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this: that private wrongs, or civil injuries are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties, due to the whole community, considered as a community, in it's [sic] social aggregate capacity.

4 *Commentaries* *5. Lord Mansfield aptly described the general acceptance of Blackstone's famous formulation: "Now, there is no distinction better known, than the distinction between civil and criminal law; or between criminal prosecutions and civil actions. Mr. Justice Blackstone and all modern and ancient writers upon the subject distinguish between them." *Atcheson v. Everitt*, (1776) 98 Eng. Rep. 1142, 1147 (K.B.).

Although crimes often result in "injury done to individuals," Blackstone explained that their essence was nonetheless public: "they strike at the very being of society; which cannot possibly subsist, where actions of this sort are suffered to escape with impunity." 4 *Commentaries* *5. For example, "[m]urder is an injury to the life of an individual; but the law of society considers principally the loss which the state sustains by being deprived of a member, and the pernicious example thereby set, for others to do the like." *Id.* at *6. Put otherwise, the criminal law "secure[s] to the public the benefit of society, by preventing or punishing every breach and violation of those laws, which the sovereign power has thought proper to establish, for the government and tranquility of the whole." *Id.* at *7.

The common-law definition of crime further turned on the type of relief or punishment attendant to criminal cases, again in contrast to its civil counterpart: criminal punishment by death, "fine," or "imprisonment," versus "civil satisfaction in damages" or injunctive relief. 4 *Commentaries* *6. Blackstone noted, for instance, that in the case of battery the King could indict "for disturbing the public peace" and punish the "aggressor" "criminally by fine and imprisonment"; the "party beaten," on the other hand, could have "his private remedy by action of trespass for the injury, which he in particular sustains, and recover a civil satisfaction in damages." *Id.* A century later, Stephen similarly contrasted civil remedies "imposed entirely for the sake of the injured party"

with criminal sanctions "consist[ing] in suffering imposed on the person disobeying . . . for the public, and at the discretion and by the direction of those who represent the public." 1 James F. Stephen, *A General View of the Criminal Law* 4 (London, Cambridge, MacMillan 1863).

Because crimes were "a breach and violation of the public rights and duties," 4 *Commentaries* *5, and the King was charged with protecting the public, criminal proceedings were conducted in the name of the sovereign, who "is supposed by the law to be the person injured by every infraction of the public rights belonging to that community, and is therefore in all cases the proper prosecutor for every public offense." *Id.* at *2; *see also* Cesare Beccaria, *On Crimes & Punishments* 21 (Edward Ingraham, trans., 2nd Am. ed. 1819) (1764) ("[I]n this case there are two parties, one represented by the sovereign, who insists upon the violation of the contract, and the other is the person accused, who denies it."). As Blackstone explained:

> All offences are either against the king's peace, or his crown and dignity; and are so laid in every indictment. For, though in their consequences they generally seem (except in the case of treason and a very few others) to be rather offences against the kingdom than the king; yet, as the public, which is an invisible body, has delegated all it's [sic] power and rights, with regard to the execution of the laws, to one visible magistrate, all affronts to that power and breaches of those

> rights, are immediately offences against him, to whom they are so delegated by the public.

William Blackstone, 1 *Commentaries* *258-59 [hereinafter 1 *Commentaries*]. Indictments received by the grand jury were "preferred to them in the name of the king," 4 *Commentaries* *300, and were invalid unless concluded with the phrase "against the peace of the King . . . ; because all crimes which are the subjects of a criminal prosecution, are injurious to public peace and order, and the injury done to the commonwealth is considered as done to the Sovereign." 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* *246 (1819); *see also* 6 *Encyclopedia of the Laws of England* 374 (A. Wood Renton, ed., 1898) (stating that words "against the peace of our Lady the Queen, Her Crown and dignity" reveal public nature of all crime). Similarly, the power to pardon offenses belonged to the Crown, because "it is reasonable that he only who is injured should have the power of forgiving." 1 *Commentaries* *259; *see also* 4 *Commentaries* *391.

American common law firmly embraced the principle that a crime is an offense against the sovereign and that suits are therefore brought in the name of the sovereign. *See, e.g.*, *Commonwealth v. Casey*, 94 Mass. (12 Allen) 214, 219 (1866) (Gray, J.) ("It is an axiom of public law . . . that 'every criminal prosecution must charge the offence to have been committed against the sovereign whose courts sit in judgment upon the offender, and whose executive may pardon him.'") (quoting 1 James Kent, *Commentaries on*

American Law 403 (6th ed.) (1826)); 1 Joel P. Bishop, *Commentaries on the Criminal Law* § 43 (2d ed. 1858) ("Criminal law treats of those wrongs which the government . . . punishes in what is called a criminal proceeding, in its own name."); 1 Emlin McClain, *A Treatise on the Criminal Law* § 4 (1897) ("A crime is an act or omission punishable as an offense against the state. . . . [I]n case of a crime, the state is deemed the injured party and punishes the wrong-doer [ ] in its own name."); 1 Francis Wharton, *Wharton's Criminal Law* § 10 (10th ed. 1896) ("Penal justice, therefore, is a distinctive prerogative of the State, to be exercised in the service [of] the State."). And many of the original Colonies made the public nature of criminal prosecutions an explicit feature of their State constitutions by incorporating the requirement that indictments read "against the peace and dignity" of the sovereign. *See, e.g.*, Del. Const. of 1776, art. 20 ("Indictments shall conclude, '*Against the peace and dignity of the State*'."); Md. Const. of 1776, § 57 (same); N.J. Const. of 1776, § 15 (same); N.C. Const. of 1776, § 36 (same); Pa. Const. of 1776, § 27 (same); S.C. Const. of 1790, art. III, § 2 (same); Va. Const. of 1776 (same); *see also* Vt. Const. of 1786, ch. 2, § 29 (same).

American acceptance of the axiomatic principle that crimes are public wrongs emerges in even bolder relief when viewed in tandem with the historical rejection of a close analogue to the type of private

criminal cause of action endorsed by the court of appeals in Mr. Robertson's case. The "appeal,"[10] a medieval-era mode of criminal prosecution, was a private suit that stemmed from the natural-law notion of private vengeance for *mala in se* acts. In his chapter on "Modes of Prosecution," Blackstone described presentments and indictments, which he characterized as "methods of prosecution at the suit of the king." 4 *Commentaries* *308. He continued:

> There yet remains another, which is merely at the suit of the subject, and is called an *appeal*. . . . An appeal . . . when spoken of as a criminal prosecution, denotes an accusation by a private subject against another, for some heinous crime; demanding punishment on account of the particular injury suffered, rather than for the offense against the public.

Id. Thus, while prosecutions by indictment or presentment were public actions at the suit of the King, appeals were private actions grounded in notions of personal vengeance, historically settled through the decidedly personal and vengeful mechanism of "trial by battle." Raymond K. Berg, *Criminal Procedure: France, England, & the United States*, 8 DePaul L. Rev. 256, 265 (1959); *see also* 1 James F. Stephen, *A*

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[10] This action variously went by the names "appeals of felony," "appeals of murder," and "appeals of death." *See generally* William R. Riddell, *Appeal of Death & Its Abolition*, 24 Mich. L. Rev. 786 (1926).

History of the Criminal Law of England 245 (London, MacMillan 1883) [hereinafter Stephen, *History of the Criminal Law*] ("The history of appeals or accusations by a private person and trial by battle go together, as trial by battle was an incident of appeals.").

The appeal, a vestigial remnant of the "primitive conditions of society," Riddell, *supra* n.10 at 1, was in virtual disuse in England by the late eighteenth century. While Stephen explained that "the only appeals which can be said to have . . . formed a substantial part of the criminal procedure of [England] were appeals of murder," 1 Stephen, *History of the Criminal Law* at 248, he noted that even the appeal of murder virtually had ended in England by the late eighteenth century. *See id.* at 248-49. Blackstone felt constrained to describe appeals, but only while simultaneously noting that the practice was already then in virtual disuse: "As this method of prosecutions is still in force, I cannot omit to mention it: but as it is very little in use . . . I shall treat of it very briefly." 4 *Commentaries* *308.

Perhaps more important than its declining status in England at the time of the framing, the practice never took hold in the Colonies. *See generally Burns v. Reed*, 500 U.S. 478, 493 (1991) ("[I]t is American common law that is determinative."). Early jurisprudence in the States recognized the appeal of felony as an oddity of the English common law, never practiced after independence on this side of the ocean. *See Boston & W.R. Corp. v. Dana*, 67 Mass. (1 Gray) 83, 97-98 (1854) ("No one has ever heard of an appeal

of felony . . . in our courts. So far therefore as we know the origin of the rule and the reasons on which it was founded, it would seem very clear that it was never adopted here as part of our common law."); *State v. Gerry*, 38 A. 272, 273 (N.H. 1896) ("The English common law respecting appeals of murder and other crimes and its rule that one found guilty of a felony by the verdict of a jury in a civil cause might, without other accusation, be put on trial for the crime were never adopted here.") (citations omitted); *In re Presentment by Camden County Grand Jury*, 89 A.2d 416, 423-24 (N.J. 1952) (noting "no record of its use has been located" in New Jersey); *Barnet v. Ihrie*, 17 Serg. & Rawle 174, 214 (Pa. 1828) (Huston, J., dissenting) ("I think no one will say, that an appeal of murder or felony was ever in use in Pennsylvania, or that it can be, since the present constitution."); *Allison v. Farmers' Bank of Va.*, 27 Va. (6 Rand.) 204, 225 (1828) ("In all these respects, the policy and spirit of our Laws are the reverse of those of the English Laws. We have no appeal, in which the right to a civil action can merge."). The colorful words of a Pennsylvania court reflect American distaste for the private criminal suit:

> The old common-law right of prosecuting the higher felonies by appeal, which had sprung from a barbarous state of society, was left by our ancestors in the lumber garrets of the law at home. . . . These are not the days to encourage individuals, or the masses, to snatch the reins from the constituted organs of the government. . . . Astounding results

> proceed from small beginnings; and we have already beheld appalling scenes enacted in our commercial emporium with impunity, and almost without resistance, by men who took the law into their own hands in the name of the people.

Commonwealth v. Burrell, 7 Pa. 34, 39 (1847).[11]

This Court previously identified only a single instance of the appeal used here, a 1765 case in the Maryland province, *Soaper v. Negro Tom*, 1 H. & McH. 227 (Md. 1765), where under English law a private appeal of murder resulted in the hanging of a slave. *See Hurtado v. California*, 110 U.S. 516, 526 (1884). Notably, the private cause of action was subsequently deemed inconsistent with the Maryland Constitution. *See* William Kilty, *A Report of English Statutes* 141, 143, 158 (1811); *see generally Dashiell v. Attorney General*, 5 H. & J. 392 (Md. 1822) (relying on *A Report of English Statutes* to determine which English statutes were applicable in Maryland). In *Louisville, Evansville, & St. Louis R.R. Co. v. Clarke*, 152 U.S. 230 (1894), this Court described the English

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[11] These words echo the sentiments of Montesquieu, who unfavorably compared the Roman practice of permitting "one citizen to accuse another," that led to "a pernicious tribe, a swarm of informers" with the more modern and "admirable law . . . by which the prince, who is established for the execution of the laws, appoints an officer . . . to prosecute all sorts of crimes in his name." 1 Charles de Secondat, Baron de Montesquieu, *The Spirit of Laws* 87 (Thomas Nugent trans., J.V. Prichard rev. 1914) (1748).

practice of the appeal, but recognized that "we do not in this country depend upon the injured party, or his representative, to institute criminal prosecutions." 152 U.S. at 235-36.

This critical understanding that all criminal prosecutions were brought on behalf of the sovereign was in no sense compromised by the practice, employed less frequently in the Colonies than it had been in England, of utilizing private individuals to represent the State in some criminal prosecutions. *See generally* Lawrence M. Friedman, *Crime and Punishment in American History* 29 (1993) ("The public prosecutor – a government officer in charge of prosecution – appeared quite early on this side of the Atlantic."). As in England, where "all prosecutions were formerly conducted on behalf of the crown by the privately retained counsel of private prosecutors," *King v. State,* 31 So. 254, 257 (Fla. 1901), in the circumstances where the practice of private prosecutions continued in the Colonies or States, such actions were brought in the name of and pursuant to the power of the sovereign. In importing the English private-prosecutor tradition to our legal system, American courts merely substituted the new world's sovereign – the "State" – for the old world's sovereign – "the Crown." *See, e.g.*, 31 So. at 257 ("The fact that [counsel] may have been retained by the prosecuting witnesses to prosecute the case does not render him ineligible to represent the interests of the state in such prosecution."); *Waldron v. Tuttle*, 4 N.H. 149, 151 (1827) ("[P]rivate individuals . . . have the power to prosecute in the

name of the state."). Thus, in *State v. Peabody*, 55 A. 323 (R.I. 1903), where Peabody had been privately prosecuted on a misdemeanor charge of failing to support his children and argued on appeal that the death of the private prosecutor had the effect of extinguishing his criminal conviction, the court soundly rejected his argument:

> The position taken by defendant's counsel that the death of the complainant operates as an abatement of the proceeding, is untenable. The state is the real party in all criminal prosecutions. . . . It is the peace and dignity of the state which has been violated in the commission of any crime or offense, and hence no one but the state can, in any true sense, prosecute the offender for such a wrong.

55 A. at 323.[12]

It is not possible to read the Constitution correctly, in particular its pervasive dependence on the

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[12] Modern cases in jurisdictions that permit private prosecutions also recognize that such actions are brought in the name of the sovereign. *See Rogowicz v. O'Connell*, 786 A.2d 841, 844 (N.H. 2001) ("Private attorneys appointed to prosecute [a criminal action] . . . represent the State."); *State v. Westbrook*, 181 S.E.2d 572, 583 (N.C. 1971) ("The prosecuting attorney, whether the solicitor or privately employed counsel, represents the State."), *vacated on other grounds*, 408 U.S. 939 (1972) (mem.); *Cronan ex rel. State v. Cronan*, 774 A.2d 866, 880 (R.I. 2001) ("Although they were privately employed [by the alleged victim to a domestic assault], the attorneys who prosecuted this case represented the state.").

concept of crime and its scrupulous attention to how the federal government's power to establish, prosecute, and punish crimes should be allocated among the branches of government and regulated in application to individual persons, without appreciating that the Framers believed that criminal prosecutions could only be brought on behalf of the sovereign. As this Court has often recognized, the Framers were "steeped in the common-law tradition of England. They read Blackstone, a classic tradition of the bar in the United States and the oracle of the common law in the minds of the American Framers." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 382 n.14 (1974) (citations and quotations omitted). The settled understanding of crimes as public wrongs prosecuted on behalf of the people as a whole is an axiom of our common-law heritage that limits and controls the interpretation of the words used in the Constitution. *See generally Principality of Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934). If the Framers had wanted "crimes" in the Constitution to encompass anything beyond the established definition at the time, surely they would have said so explicitly.

What the Framers did say explicitly was that our criminal prosecutions would be characterized by a right to grand jury indictment (in the case of felonies), executive pardon power, and protection against being put in jeopardy twice for the same offense, all features of a system of criminal justice that turns its face on the moribund English practice of appeals. Appeals, as Blackstone described them, were

alternatives to the "methods of prosecution at the suit of the king" – that is, public criminal actions by indictment or information. 4 *Commentaries* *308; *see also* 1 Stephen, *History of the Criminal Law* at 244 ("Since the Norman Conquest there have been . . . three modes of accusation, namely, appeal . . . by a private person, indictment . . . by a grand jury, and informations."). The Indictment Clause of the Fifth Amendment therefore is inconsistent with the possibility of federal private criminal rights of action in this country.[13]

Similarly, the Constitution grants the President the "Power to grant Reprieves and Pardons for Offenses against the United States," U.S. Const. art. II, § 2, cl. 1, whereas at English common law the King could "no more pardon [an appeal] than he c[ould] remit the damages recovered on an action of battery." 4 *Commentaries* *311; *see also* 1 Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, & Other Pleas of the Crown, & Criminal Causes* 236 (1797) ("[T]he king cannot pardon the defendant for the appeal is the suit of the party."). Also, an acquittal on an indictment did not bar an appeal of felony: "on the contrary, if [the

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[13] Story's influential work on the Constitution discusses both indictments and informations, but makes no mention of the "appeal of felony," the only private criminal action known to our common-law tradition. *See* 2 Joseph Story, *Commentaries on the Constitution of the United States* §§ 1780-1786 (Melville Bigelow ed., William S. Hein Co., 5th ed., 1994) (1833).

accused] made peace with the king, still he might be prosecuted at the suit of the party." 4 *Commentaries* *311; *see also Bigby v. Kennedy*, (1770) 98 Eng. Rep. 389 (K.B.); 1 Stephen, *History of the Criminal Law* at 249 (stating that acquittal on indictment "was practically conclusive, unless the prisoner was acquitted under circumstances which greatly dissatisfied the parties concerned").[14] Thus, the Pardon Clause and the Double Jeopardy Clause cannot be reconciled with an alternative system for prosecuting crimes in which the suit belongs to an individual and not the government.

More broadly, the protections the Framers placed into the Bill of Rights regulate the relationship between individuals and the *government* that might seek to prosecute or punish them. When the First Congress wrote the Fifth Amendment and stated that "no person . . . shall be compelled in any criminal case to be a witness against himself," certainly they were contemplating a "criminal case" to be one prosecuted by the sovereign, as all criminal cases were. U.S. Const. amend. V; *see also Chavez v. Martinez*, 568

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[14] Although no bar existed to an appeal of felony after an acquittal on an indictment, it is unclear whether double jeopardy barred indictment by the Crown after acquittal on an appeal. *Compare* 4 *Commentaries* *311 (stating that appeals of felony "may be brought, previous to any indictment; and, if the appellee be acquitted thereon, he cannot be afterwards indicted for the same offence"), *with* 1 Stephen, *History of the Criminal Law* at 246 (maintaining that if defendant were acquitted on appeal of felony, he nonetheless could "be tried by the country as if he had been indicted").

U.S. 760, 770 (2003) (finding that constitutional right against self-incrimination applies only in criminal cases). The same can be said for the Sixth Amendment guarantees of confrontation, compulsory process, and the right to counsel, which are all guaranteed to the accused in "criminal prosecutions." U.S. Const. amend. VI. The Eighth Amendment's prohibition against excessive fines, U.S. Const. amend. VIII, applies only to criminal actions, not suits between private parties. *See Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989). The protections that the Framers wrote into the Bill of Rights leave no doubt that the Framers contemplated that the government would be party to all criminal prosecutions.[15]

This Court's constitutional jurisprudence has followed Blackstone's definition of a crime as a public wrong and has reflected, without exception, the understanding that all criminal actions in this country are brought in the name of the sovereign. As far back as *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), this Court made clear that the power to punish violators of the criminal law in this country is a *sovereign* power:

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[15] If this Court sustains the right of a legislature to create a private federal criminal right of action, each of these procedural protections, including those secured by the Due Process and Equal Protection clauses, will become open questions in new, uncharted territory. *See, e.g., United States v. Armstrong*, 517 U.S. 456, 465 (1996); *Brady v. Maryland*, 373 U.S. 83 (1963); *Napue v. Illinois*, 360 U.S. 264 (1959).

> The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers.

Id. at 418; *see also Heath v. Alabama*, 474 U.S. 82, 93 (1985) ("Foremost among the prerogatives of sovereignty is the power to create and enforce a criminal code.").

Not long after *M'Culloch*, this Court considered a case in which a defendant had been indicted for a federal crime of violence against an ambassador. *United States v. Ortega*, 24 U.S. (11 Wheat.) 467 (1826). Presented with the question whether this was a "case affecting an ambassador or other public minister, within the meaning of the second section of the third article of the constitution of the United States," thereby implicating this Court's original jurisdiction, the Court deemed it "clear[ ]" that "this is not a case affecting a public minister, within the plain meaning of the constitution." 24 U.S. at 468-69. Rather, the only parties to a federal criminal action are the United States and the individual it seeks to punish:

> It is that of a public prosecution, instituted and conducted by and in the name of the United States for the purpose of vindicating the law of nations, and that of the United States. . . . It is a case, then, which affects the United States, and the individual whom

> they seek to punish; but one in which the minister himself, although he was the person injured by the assault, has no concern.

Id. at 469; *see also Blyew v. United States*, 80 U.S. (13 Wall.) 581, 591 (1871) ("Obviously the only parties to [a criminal prosecution] are the government and the persons indicted.").

In *Huntington v. Attrill*, 146 U.S. 657 (1892), this Court needed to determine whether a judgment was civil or criminal in order to decide whether the Full Faith and Credit Clause, U.S. Const. art. IV, § 1, applied. The *Huntington* Court rooted its conception of crime in the common-law understanding of an offense against the sovereign: "Penal laws, strictly and properly, are those imposing punishment for an offense committed against the state, and which, by the English and American constitutions, the executive of the state has the power to pardon." 146 U.S. at 667. *Huntington* also relied on Blackstone's definition of crime as a public wrong, stating:

> The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual, according to the familiar classification of Blackstone: "Wrongs are divisible into two sorts or species: private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed 'civil injuries;' the latter are a breach and violation of public

> rights and duties, which affect the whole community, considered as a community, and are distinguished by the harsher appellation of 'crimes and misdemeanors.'"

Id. at 668-69 (quoting William Blackstone, 3 *Commentaries* *2). In discussing extradition, the *Huntington* Court could hardly have been more explicit that in our constitutional system the party to a criminal action is the sovereign, whose "peace" has been broken:

> Crimes and offenses against the laws of any state can only be defined, prosecuted, and pardoned by the sovereign authority of that state; and the authorities, legislative, executive or judicial, of other states take no action with regard to them, except by way of extradition, to surrender offenders to the state whose laws they have violated, and whose peace they have broken.

Id. at 669.

This Court also has grounded its double jeopardy jurisprudence in the bedrock understanding that criminal prosecutions are prosecuted in the name and power of the sovereign. The holding in *Heath v. Alabama*, 474 U.S. 82 (1985), that "successive prosecutions by two States for the same conduct are not barred by the Double Jeopardy Clause," was based on the "common-law conception of crime as an offense against the sovereignty of the government," and the understanding that an "offence," as that term is used in the Fifth Amendment, occurs when the "peace and

dignity" of a sovereign have been violated. 474 U.S. at 88; *see also United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) (describing "crime" as "act done by an individual in supposed violation of the peace and dignity of the sovereign power"). This conception of a crime as an injury to the sovereign similarly led this Court to hold that "an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each." *United States v. Lanza*, 260 U.S. 377, 382 (1922).

Given this unwavering understanding of a criminal prosecution as an action brought by the sovereign, it is not surprising that, close to a century after *Huntington*, this Court defined a federal "criminal prosecution" as "a judicial proceeding in a federal court alleging violation of federal laws and . . . brought in the name of the United States as sovereign." *United States v. Nixon*, 418 U.S. 683, 694 (1974). And, echoing *Ortega*, this Court has stated, in a variety of contexts, that, "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973); *see also Town of Castle Rock v. Gonzales*, 545 U.S. 748, 767 n.13 (2005); *Diamond v. Charles*, 476 U.S. 54, 64 (1986).[16] As the Constitution's text, its

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[16] The Judiciary Act of 1789 provided for the appointment in each judicial district of "a meet person learned in the law to act as attorney for the United States . . . whose duty it shall be to prosecute in such district all delinquents for crimes and offences,

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history, and the constitutional jurisprudence of this Court make clear, when the Framers drafted our Constitution, they incorporated into it a definition of crime as a public wrong, and of a criminal proceeding as an action between a sovereign and the individual whom the sovereign seeks to punish.

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cognizable under the authority of the United States." Judiciary Act of 1789, Ch. 20, § 35, 1 Stat. 92. Federal courts have rejected the notion of an individual pursuing a private criminal right of action. *See Keenan v. McGrath*, 328 F.2d 610, 611 (1st Cir. 1964) ("[W]e [are] unaware of any authority for permitting a private individual to initiate a criminal prosecution in his own name in a United States District Court."); *Bass Angler Sportsman Soc'y v. United States Steel Corp.*, 324 F. Supp. 412, 415 (S.D. Ala. 1971) ("Equally important is the firmly established principle that criminal statutes can only be enforced by the proper authorities of the United States Government and a private party has no right to enforce these sanctions."); *Pugach v. Klein*, 193 F. Supp. 630, 635 (S.D.N.Y. 1961) ("Nor is there a residual power in private citizens to take law enforcement into their own hands when the United States Attorney does not prosecute, for any, or for no reason."); *see also Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 816 n.2 (1987) (Scalia, J., concurring) ("I am unaware . . . of any private prosecution of federal crimes.").

II. THE CONSTITUTION REQUIRES THAT CRIMINAL CONTEMPT PROCEEDINGS IN CONGRESSIONALLY CREATED COURTS BE BROUGHT ON BEHALF OF THE GOVERNMENT.

A. BECAUSE CRIMINAL CONTEMPTS ARE CRIMES IN THE ORDINARY SENSE, CRIMINAL CONTEMPT PROSECUTIONS ARE ACTIONS BETWEEN THE PUBLIC AND THE ACCUSED.

Criminal contempt, like every other crime, is a public wrong. Thus, a criminal contempt prosecution, like every other criminal prosecution, is "between the public and the defendant." *Michaelson v. United States ex rel. Chi., St. Paul, Minneapolis & Omaha Ry. Co.*, 266 U.S. 42, 64 (1924). As this Court has explained:

> Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both. In the words of Mr. Justice Holmes: "These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristics of crimes as that word has been understood in English speech."

Bloom v. Illinois, 391 U.S. 194, 201 (1968) (footnote omitted) (quoting *Gompers v. United States*, 233 U.S. 604, 610 (1914)). The word "crime," as it "has been understood in English speech," 391 U.S. at 201,

denotes a "public wrong[,] . . . a breach and violation of public rights and duties, which affect the whole community, considered as a community." William Blackstone, 3 *Commentaries* *2. As was clear to Justice Holmes in 1914, criminal contempt is absolutely no different.

Blackstone characterized criminal contempt as a "disturbance of public justice." 4 *Commentaries* *125. It is an affront to the authority of a specific organ of government, an act which "violates the dignity and authority of the . . . courts." *Ex Parte Grossman*, 267 U.S. 87, 115 (1925). Because a criminal contempt action vindicates the authority of the court, it serves the sovereign's interest in ensuring that its institutions are respected and indeed preserved. *See United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812). It is a power of a public institution that "cannot be dispensed with in a Court, because [it is] necessary to the exercise of all others." *Id.* And, in *Ex Parte Grossman*, *supra*, this Court noted that, "long before our Constitution," it was "recognized at common law" that a sentence for criminal contempt was "imposed to punish the contemnor for violating the dignity of the court and the king, in the *public interest*." 267 U.S. at 111 (emphasis added). Like all crimes, therefore, criminal contempt is an offense against the sovereign, and a public wrong.

Because an attack on the dignity of the court can be addressed either through criminal or civil contempt, courts are often called upon to discern whether a particular contempt proceeding is criminal or civil

in nature. The fundamental difference has been long-established:

> Proceedings for contempts are of two classes, – those prosecuted to preserve the power, and vindicate the dignity, of the courts, and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial, and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce. . . . A criminal contempt involves no element of personal injury. It is directed against the power and dignity of the court, and private parties have little, if any, interest in the proceedings for its punishment.

Bessette v. W. B. Conkey Co., 194 U.S. 324, 328 (1904) (citations and quotations omitted).

Of course, when a criminal contempt action brought to "vindicate the authority of the law" penalizes disobedience of a court order, the private order holder may "derive some incidental benefit" because the punishment imposed in the name of the sovereign

"tends to prevent a repetition of the disobedience" of the order. *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 443 (1911). This fact, however, is true of virtually any successful criminal prosecution. "It is true that the private party receives an incidental advantage from the infliction of the penalty" in a criminal contempt case, but it is the same sort of advantage which accrues to the prosecuting witness in any criminal case: "the advantage being that the punishment . . . has a tendency to prevent the repetition of the offence." Stewart Rapalje, *A Treatise on Contempt* § 21 (1884) (citations and quotations omitted); *see also Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 828 (1994) ("Most contempt sanctions, like most criminal punishments, to some extent punish a prior offense as well as coerce an offender's future obedience."). But, just as the incidental vindication of private interests does not alter the public nature of any criminal prosecution, the potential for such "indirect consequences" to flow from a criminal contempt prosecution does not alter the bedrock principle that such prosecution is necessarily on behalf of the sovereign. 221 U.S. at 443.[17]

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[17] The court of appeals' holding here was infected fatally by its perception that criminal contempt presents a "special situation" because, in its view, "'[a] court, enforcing obedience to its orders by proceedings for contempt, is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to.'" (Cert. Pet. App. A.14.) As this Court has repeated on multiple occasions, the purpose of a criminal contempt prosecution is to protect "the institutions of our

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In *Gompers v. Buck's Stove & Range Co.*, *supra*, this Court held that the determination of whether a contempt is civil or criminal rests on the "character and purpose" of the remedy imposed. 221 U.S. at 441. "If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court." *Id.* The other "important difference" the *Gompers* Court identified related to the identification of the parties to the different types of contempt proceedings: "Proceedings for civil contempt are between the original parties, and are instituted and tried as part of the main cause. But, on the other hand, proceedings at law for criminal contempt are between the public and the defendant, and are not a part of the original cause." *Id.* at 444-45. Thus *Gompers* made clear that criminal contempt actions, like all criminal actions, are actions "between the public and the defendant." *Id.* at 445.

Applying these principles to the facts before it, the *Gompers* Court determined that the contempt proceeding at issue was criminal, as fixed terms of imprisonment had been imposed on the three defendants. 221 U.S. at 444. But because the case had been litigated with Buck's Stove & Range Company, a private entity, as the "actual [ ] party on the one side,

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government." *Bloom*, 391 U.S. at 201. The fact that some "incidental benefit" might flow to the civil litigant does not change the fundamental nature of the proceeding. *Gompers*, 221 U.S. at 443.

with the defendants on the other," *id.* at 445, this Court concluded that the imposition of criminal penalties was improper. In the words of this Court: "The result was as fundamentally erroneous as if in an action of 'A vs. B, for assault and battery,' the judgment entered had been that the defendant be confined in prison for twelve months." *Id.* at 449. Consequently, it set aside the orders of imprisonment. *Id.*

There can be no question that Mr. Robertson suffered criminal penalties in this case.[18] It is equally clear, under the lower court's holding, that the proceeding was prosecuted by Ms. Watson as the "actual[ ] party on the one side," with Mr. Robertson on the other. (Cert. Pet. App. A.14 (holding that criminal prosecution was brought "in the name and interest of [Ms.] Watson, not as a public action brought in the name and interest of the United States or any other governmental entity").) Because these circumstances make Mr. Robertson's case indistinguishable from *Gompers*, his sentence must be set aside.

This Court consistently has relied on *Gompers* in making nuanced distinctions in the nature of the remedy to distinguish between criminal and civil contempt actions. "[T]he critical features are the substance of the proceeding and the character of the

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[18] The judge sentenced Mr. Robertson to three 180-day jail sentences (one term suspended) and a five-year term of probation. (J.A. at 63.)

relief that the proceeding will afford." *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 631 (1988) (citing *Gompers*); *see also Bagwell*, 512 U.S. at 827 ("In the leading early case addressing this issue in the context of imprisonment, *Gompers* . . . , the Court emphasized that whether a contempt is civil or criminal turns on the 'character and purpose' of the sanction involved.") (citation omitted); *Shillitani v. United States*, 384 U.S. 364, 369 (1966) ("'It is not the fact of punishment, but rather its character and purpose, that often serve to distinguish' civil from criminal contempt.") (quoting *Gompers*, 221 U.S. at 441); *United States v. United Mine Workers of Am.*, 330 U.S. 258, 302 (1947) ("Sentences for criminal contempt are punitive in their nature and are imposed for the purpose of vindicating the authority of the court.") (citing *Gompers*). Equally important, this Court repeatedly and necessarily has applied the fundamental proposition from *Gompers* that criminal contempt proceedings arising out of civil litigation "are between the public and the defendant," because the party alignment is essential to the definition of crime itself. *See, e.g., United States v. Providence Journal Co.*, 485 U.S. 693, 700 (1988); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 804 (1987); *Ex Parte Grossman*, 267 U.S. at 111; *Michaelson*, 266 U.S. at 67. Indeed, this Court's view of criminal contempt as a "crime in the ordinary sense" and a "public wrong" has been unwavering, a fact that perhaps is unsurprising given that Justice Holmes labeled the matter so "fundamental" in 1914. *Gompers v. United States*, 233 U.S. 604, 610 (1914).

Because criminal contempt is by definition a punitive remedy to vindicate the authority of the court and, as with all crimes, is an action between the sovereign and the accused, this Court also has made it abundantly clear that the party to a criminal contempt prosecution in federal court is the United States even when a case is privately prosecuted. In *Young*, *supra*, this Court affirmed the authority of a court to appoint a private prosecutor if necessary to vindicate its authority in a contempt proceeding, but directed, as a matter of this Court's supervisory authority, that an interested party's counsel not receive such an appointment. The decision was rooted in the same fundamental principle that animated this Court's holding in *Gompers v. Buck's Stove & Range Co.* – a criminal contempt prosecution, no matter whether a public or private lawyer actually stands in the courtroom well and serves as prosecuting attorney, is brought by the government to vindicate public wrongs. "Private attorneys appointed to prosecute a criminal contempt action represent the United States, not the party that is the beneficiary of the court order allegedly violated. . . . The prosecutor is appointed *solely* to pursue the public interest in vindication of the court's authority." *Young*, 481 U.S. at 804 (emphasis added).

The notion that criminal contempt proceedings are "between the public and the defendant" also animated this Court's decision in *United States v. Dixon*, 509 U.S. 688 (1993), where this Court deemed it "obvious" that the protection of the Double Jeopardy Clause of the Fifth Amendment attaches

to nonsummary criminal contempt proceedings – including a proceeding that was privately prosecuted – because of the "well established" proposition "that criminal contempt . . . is 'a crime in the ordinary sense.'" 509 U.S. at 696 (citations omitted). This Court in *Dixon* construed precisely the contempt provision at issue in this case, as the consolidated case of Michael Foster involved a criminal contempt action brought pursuant to D.C. Code § 16-1005(f), and was prosecuted by private counsel for the beneficiary of the civil protection order. 509 U.S. at 693. But Mr. Foster's case could not have been correctly decided if, as construed by the court of appeals here, D.C. Code § 16-1005(f) authorizes a private right of action, and a prosecution by the private party under D.C. Code § 16-1005(f) is brought in her own name and interest, because "[t]he protections of the Double Jeopardy Clause are not triggered by litigation between private parties." *United States v. Halper*, 490 U.S. 435, 451 (1989), *abrogated on other grounds by Hudson v. United States*, 522 U.S. 93 (1997); *see also Heath v. Alabama*, 474 U.S. 82, 88 (1985) (noting that dual sovereignty doctrine "is founded on the common-law conception of crime as an offense against the sovereignty of the government"); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 548-49 (1943) (noting "the line between civil, remedial actions brought primarily to protect the government from financial loss and actions intended to authorize criminal punishment to vindicate public justice," and holding that "[o]nly the latter subject the defendant to 'jeopardy' within the constitutional meaning").

This Court, fully aware that a private person prosecuted Mr. Foster, never countenanced the possibility that in the case before it the United States did not enjoy party status. Indeed, the United States and Michael Foster were the only parties to that action. Nor did the United States even intimate that the Double Jeopardy Clause was not implicated because the government was not the real party-in-interest, although it is axiomatic that the Double Jeopardy Clause does not apply to suits between private parties. And, this Court *held* that the contempt prosecuted against Mr. Foster was "'a crime in the ordinary sense,'" 509 U.S. at 696 (quoting *Bloom*, 391 U.S. at 201), which is most certainly a "public wrong," lest we be "'in error as to the most fundamental characteristics of crime as that word has been understood in English speech.'" *Bloom*, 391 U.S. at 201 (quoting *Gompers*, 233 U.S. at 610 (Holmes, J.)). Therefore, to the extent that this Court is constrained by the interpretation of the District of Columbia Court of Appeals that D.C. Code § 16-1005(f) permits a private right of action, this Court must conclude that it should have held the contempt prosecuted against Mr. Foster void. *Gompers v. Buck's Stove & Range Co.*, 221 U.S. at 449. Instead, this Court should conclude that the lower court erred in holding that a private party may constitutionally pursue a private right of action for criminal contempt of a congressionally created court. Because criminal contempt is a crime in the ordinary sense, the action brought against Mr. Robertson could have only lawfully and constitutionally been prosecuted by the United States.

This Court must reverse the decision of the lower court.

B. A PRIVATE CRIMINAL CONTEMPT ACTION, NEITHER JUSTIFIED BY THE DOCTRINE OF NECESSITY NOR LIMITED BY THE PRINCIPLE OF RESTRAINT, CREATES AN IMPERMISSIBLE THREAT TO LIBERTY.

The justification for the contempt power rests in the need for public institutions, the institutions of government, to have a mechanism to vindicate their authority. The contempt power thus is rooted in the "one maxim which necessarily rides over all others" – "that the public functionaries must be left at liberty to exercise the powers which the people have intrusted to them." *Anderson v. Dunn*, 19 (6 Wheat.) U.S. 204, 226 (1821). This doctrine of necessity animates all criminal contempt proceedings:

> The traditional justification for the relative breadth of the contempt power has been necessity: Courts independently must be vested with "power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and . . . to preserve themselves and their officers from the approach and insults of pollution." *Anderson v. Dunn*, [19 U.S. (6 Wheat.) 204, 226 (1821)]. Courts thus have embraced an inherent contempt authority, *see Gompers*, [221 U.S. at 450; *Ex parte Robinson*, 86 U.S. (19 Wall.)

> 505, 510 (1873)], as a power "necessary to the exercise of all others," *United States v. Hudson*, [11 U.S. (7 Cranch) 32, 34 (1812)].

Bagwell, 512 U.S. at 831.

Furthermore, because "courts cannot be at the mercy of another Branch in deciding whether such proceedings should be initiated," courts have the ability to appoint a private attorney to prosecute a criminal contempt proceeding should the Executive decline to do so. *Young*, 481 U.S. at 796. Thus, in criminal contempt jurisprudence, born from the doctrine of necessity rises a tolerated intrusion into separation of powers principles that otherwise govern criminal prosecutions. Similarly, when "disturbance or violence or physical obstruction or disrespect to the court" occurs in open court and immediate punishment is essential to prevent "demoralization of the court's authority before the public," traditional due process requirements, such as a hearing, counsel, and the opportunity to call witnesses need not be provided. *Pounders v. Watson*, 521 U.S. 982, 987-88 (1997) (citations and quotations eliminated). It is in this respect – the necessary toleration of limited intrusions on traditional separation of powers and due process principles – that criminal contempt cases differ from other criminal actions, although they all most decidedly involve public wrongs; and it is for this additional reason that the reins of a contempt proceeding cannot be handed to a private party without undermining important constitutional

principles governing the structure of government and the prosecution of crime.

A prosecution for criminal contempt can involve inroads into traditional separation of powers principles in two fundamental respects. First, such a prosecution allows for judicial intrusion into the Legislature's traditional law-making role, as the violated court order stands in the stead of the legislative code. It is a "plain principle" of our government "that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime and ordain its punishment." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). In the contempt context, however, a court order directed at an individual takes the place of penal laws of general applicability enacted by lawmakers answerable to the electorate. Second, because a judge retains the right to appoint a private prosecutor if the Executive declines to prosecute a contempt, a criminal contempt action can allow for intrusion by the Judiciary into the traditional role of the Executive. This constitutes a significant departure from normal separation of power principles, since the Executive Branch traditionally has exclusive authority and absolute discretion to decide whether and how to prosecute a case. *See Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1868); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965). Thus, as this Court has observed regarding civil contempt: "Unlike most areas of law, where a legislature defines both the sanctionable conduct and the penalty to be

imposed, civil contempt proceedings leave the offended judge solely responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct." *Bagwell*, 512 U.S. at 831. This "fusion of legislative, executive, and judicial powers 'summons forth . . . the prospect of "the most tyrannical licentiousness."'" *Id.* (quoting *Young*, 481 U.S. at 822 (Scalia, J., concurring) (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 228 (1821))).

This Court tolerates the threat to individual liberty presented by a federal court's exercise of its inherent power to initiate proceedings for contempt because of the doctrine of necessity: the "need for an independent means of self-protection, without which courts would be mere boards of arbitration whose judgments and decrees would be only advisory." *Young*, 481 U.S. at 796 (citations and quotations omitted). But necessity is the limiting principle as well. "[T]he very amplitude of the power is a warning to use it with discretion, and a command never to exert it where it is not necessary or proper." *Gompers*, 221 U.S. at 451. Thus, while courts can exercise a limited right of self-preservation by pursuing criminal contempt, they must do so only by exercising "the least power adequate to the end proposed." *Young*, 481 U.S. at 801 (citations and quotations omitted). It is a principle this Court has applied with utmost seriousness.

In the due process context, for instance, although courts have license to proceed with summary adjudication of petty direct contempts while dispensing with

many of the traditional protections of due process in order "to maintain order in the courtroom and the integrity of the trial process in the face of an actual obstruction of justice," *Bagwell*, 512 U.S. at 832 (citations and quotations omitted), if a court delays punishing a direct contempt until the completion of trial, the necessity of proceeding without due process protections vanishes and the contemnor's due process rights to notice and a hearing must be respected. *See Taylor v. Hayes*, 418 U.S. 488, 497-98 (1974). Similar notions of necessity and restraint require a court to consider civil contempt before resorting to criminal contempt, *Shillitani v. United States*, 384 U.S. 364, 371 (1966), and to exercise restraint in the imposition of contempt sanctions. *Feiock*, 485 U.S. at 637 n.8. In *Bloom*, *supra*, "considerations of necessity" could not "justify denying a jury trial in serious criminal contempt cases." 391 U.S. at 199-200. And in *Young*, although this Court recognized that, "courts have long had, and must continue to have, the authority to appoint private attorneys to initiate [criminal contempt] proceedings when the need arises," it simultaneously noted that "the rationale for the appointment authority is necessity" and directed that federal courts should first refer the case to the appropriate prosecuting authority. 481 U.S. at 801. "Such a procedure ensures that the court will exercise its inherent power of self-protection only as a last resort." *Id.*

The private criminal right of action brought against Mr. Robertson was neither justified by the

doctrine of necessity nor limited by the related principle of restraint. Contempt "is a means to an end, and not the end itself," and "rests solely upon the right of self-preservation to enable the public powers given to be exerted." *Marshall v. Gordon*, 243 U.S. 521, 541 (1917). Ms. Watson had no public powers to exert; her private right of action cannot be justified by the notion "that the public functionaries must be left at liberty to exercise the powers which the people have intrusted to them." *Anderson*, 19 U.S. at 226. No principle of restraint limited her actions. By permitting a private criminal contempt action that is neither justified by the necessity doctrine nor limited by restraint, the lower court left entirely uncontained the intrusion into separation of powers principles that has been tolerated to a limited extent in criminal contempt cases necessary to vindicate the authority of the court. And the manner in which Mr. Robertson was prosecuted involved significant – and in critical respects unprecedented – departures from the roles traditionally played by the three branches of government in criminal prosecutions. Indeed, because the government was entirely uninvolved in conducting the prosecution, the manner of prosecution raises due process concerns as well.

Pursuant to D.C. Code § 16-1005(c) (1981 & 1998 Supp.), which governed the issuance of civil protection orders in the Superior Court of the District of Columbia, a judicial finding of mere "good cause" to

believe that a respondent had either committed – or threatened to commit – an "intrafamily offense"[19] unleashed the power for a court to issue, upon petitioner's request, a civil protection order of extraordinarily broad scope. A court could direct the respondent, among other options, to "keep the peace toward the family member," to participate in psychiatric treatment, medical treatment, or "appropriate" counseling programs, to avoid the presence of the endangered family member, to vacate the dwelling unit of the complainant even if the dwelling is marital property of the parties or jointly owned or occupied, or "to perform or refrain from other actions as may be appropriate to the effective resolution of the matter." D.C. Code § 16-1005(c) (1981 & 1998 Supp.). Unlike in a case in which a court order is tethered to the particular complaint – an eviction proceeding leading to an injunction directing a tenant to vacate the premises, for instance – here the authority of the judge to create a private "criminal code" governing the single individual involved in the dispute is virtually unbounded. *See Bagwell*, 512 U.S. at 837 (noting that when contempt involved "widespread, ongoing, out-of-court violations of a complex injunction," "the court effectively policed petitioners'

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[19] An "intrafamily offense" is any act punishable as a criminal offense, committed upon certain statutorily designated persons. D.C. Code § 16-1001(5) (1981 & 1998 Supp.).

compliance with an entire code of conduct that the court itself had imposed").[20]

Then, once the judge crafts the order, the prosecutorial authority for a violation of this private criminal code can be placed solely into the hands of the private party that has requested and secured it. This too is an extraordinary departure from the norm in criminal prosecutions. "This Court has long acknowledged the Government's broad discretion to conduct criminal prosecutions, including its power to select the charges to be brought in a particular case." *Ball v. United States*, 470 U.S. 856, 859 (1985) (citing *United States v. Goodwin*, 457 U.S. 368, 382 (1982); *Confiscation Cases*, 74 U.S. at 457-59). It has guarded tightly the right of the Executive to control criminal prosecutions. *See Morrison v. Olson*, 487 U.S. 654, 695 (1988); *Confiscation Cases*, 74 U.S. at 457-59. Yet here, the Executive had no control.[21] In addition, the record in this case exposes what the Executive's prosecutorial decision *would have been* had it possessed

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[20] The civil protection order in this case compelled Mr. Robertson to "pick up the dog" from Ms. Watson's father's house on May 2, 1999. (J.A. 24.)

[21] Both the United States Attorney and the Attorney General for the District of Columbia indicated in their submissions below that they had no control over Ms. Watson's pursuit of this case. (C.A. U.S. Br. 32 ("[T]he United States Attorney's Office would not have authority to bind third parties not privy to the plea agreement.").); (Pet. C.A. App. 43-44 ("Unlike the government" the Assistant Attorney General "could not have unilaterally dismissed the motion because it belonged to Ms. Watson.").)

the right to make it. *Cf. Young*, 481 U.S. at 815 (Scalia, J., concurring) ("[W]e cannot know whether petitioners would have been prosecuted had the matter been referred to a proper prosecuting authority."). The AUSA prosecuting Mr. Robertson's initial felony case investigated the incident of June 26, 1999, and chose not to present the matter to the grand jury. (J.A. 50-51.) The fact that he then re-extended the initial plea offer, adding to it a promise not to prosecute Mr. Robertson for the June events, is further evidence that the United States had no interest in pursuing the case. (J.A. 50-51.)

This Court has described the decision whether to prosecute a criminal case as a "core executive constitutional function." *United States v. Armstrong*, 517 U.S. 456, 465 (1996). Here, as the lower court described it, the Council of the District of Columbia chose to divest the Executive of its traditional role, apparently due to a difference of opinion regarding the enforcement priority of the Executive. (Cert. Pet. App. A.12 (citing legislative determination that Office of Attorney General lacked adequate resources to prosecute criminal contempt and "prosecutes less than 10 percent of the criminal contempt motions brought for violations of civil protection orders" as basis for private right of action).) "Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charted with the duty of such enforcement. The latter are executive functions." *Springer v. Philippine Islands*, 277 U.S. 189, 202

(1928).[22] For the Legislature to divest the Executive of its constitutional function in this matter disrupts the constitutional allocation of power among the three branches of government, an allocation of power that "serves not only to make Government more accountable but also to secure individual liberty." *Boumediene v. Bush*, ___ U.S. ___, 128 S. Ct. 2229, 2246 (2008).[23]

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[22] The statute as interpreted by the lower court also interferes with the President's pardon power, as by permitting the criminal contempt action to be brought in the name of the private party, the statute defines a federal criminal action that is not "an offense against the United States." The Legislature cannot exclude a federal crime from the scope of the President's pardon power. *See Ex Parte Garland*, 71 U.S. 333, 380 (1866) ("This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders."); *see also Schick v. Reed*, 419 U.S. 256, 266 (1974) ("[T]he power flows from the Constitution alone, not from any legislative enactments, and . . . it cannot be modified, abridged, or diminished by the Congress.").

[23] Congress has established a government for the District of Columbia that incorporates constitutional notions of separation of powers. *See generally Springer*, 277 U.S. 189 (finding separation of powers principle implicit in the Organic Act of the Philippine Islands); *see also Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 274 (1991) (relying on *Springer* for constitutional separation of powers analysis). The judicial power in the District's local court system is exercised by Article I courts. *See Palmore v. United States*, 411 U.S. 389 (1973). The local legislature is subject to ultimate congressional review and control. *See* D.C. Code § 1-206.02 (1981 & Supp.). And Congress has required that, but for some inconsequential police ordinances and their equivalent, all criminal prosecutions shall be conducted "in the name of the United States by the United States attorney for the District of Columbia," unless Congress otherwise provides by law. *See* D.C.

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The problem reaches beyond an impermissible allocation of power among the three branches of government, however. In this case, the executive power shifted not to the Judiciary, as it does in judicially initiated contempt prosecutions, but rather was lodged in an entirely non-governmental actor. (J.A. 93 (in trial court's view, pursuit of contempt action was solely Ms. Watson's choice).) "[E]ven when exercising distinct and jealously separated powers, the three branches are but 'co-ordinate parts of one government.'" *Providence Journal Co.*, 485 U.S. at 701 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928)). Therefore, when a court assumes the role of the Executive in a court-initiated contempt, not only are separation of powers concerns cabined by the court's obligation to act solely when necessary for self-preservation and guided by

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Code § 23-101 (1981 & Supp.); *In re Crawley*, 978 A.2d 608, 620 (D.C. 2009); *see also Metro. R.R. Co. v. Dist. of Columbia*, 132 U.S. 1, 9 (1889) ("Crimes committed in the District are not crimes against the District, but against the United States."); *Snow v. United States*, 85 U.S. 317, 321 (1873) ("Strictly speaking, there is no sovereignty in a Territory of the United States but that of the United States itself. Crimes committed therein are committed against the government and dignity of the United States."). Critically, Congress expressly has removed from the local legislature the ability to affect the power or prosecutorial authority of the United States. *See* D.C. Code §§ 1-206.02(a)(3) & (8) (1981 & Supp.) (precluding Council of the District of Columbia from "[e]nact[ing] any act or regulation . . . relating to the duties or powers of the United States Attorney . . . for the District of Columbia" or any act or regulation "which concerns the functions . . . of the United States").

the principle of restraint, but due process concerns are minimized by the fact that control of the prosecution still rests with the government. *See Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 384 n.12 (1978) ("The responsibility of the prosecutor as a representative of the public . . . requires him to be sensitive to the due process rights of a defendant to a fair trial. *A fortiori*, the trial judge has the same . . . obligation."). To remove the government entirely from the criminal enforcement process is a structural change of enormous consequence.

Quoting the oft-quoted language from *Berger v. United States*, 295 U.S. 78 (1935), this Court in *Young* emphasized the critical role of the prosecutor (whether public or private) as a representative of the *sovereign*:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer."

Young, 481 U.S. at 803 (quoting *Berger*, 295 U.S. at 88); *see also id.* at 814 ("Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching

disruption of everyday life. For this reason, we must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice."). This right to be prosecuted by the government, whose interest is that justice be served, is grounded in the Due Process Clause. *Cone v. Bell*, ___ U.S. ___, 129 S. Ct. 1769, 1772 (2009) (reiterating that Due Process Clause includes sovereign obligation to ensure that "justice shall be done" in all criminal prosecutions); *see also Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249 (1980) (stating that due process requires that prosecutors serve the public interest). Furthermore, this Court has recognized that prosecutors are uniquely suited to serving this role: prosecutorial discretion, in the hands of a public prosecutor, serves the critical function of filtering out insubstantial legal claims. *Cheney v. United States Dist. Court for Dist. of Columbia*, 542 U.S. 367 (2004). Our system has confidence in public prosecutors' decisions because public prosecutors are presumed to act lawfully, *Armstrong*, 517 U.S. at 464, they are "publicly accountable," and they are "subject to budgetary considerations and under an ethical obligation, not only to win and zealously to advocate for [the] client but also to serve the cause of justice." *Cheney*, 542 U.S. at 386. "Moreover, a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers." *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976).

None of these constraints exist when the party bringing the criminal action bears no relation to, and is in no sense controlled by, the Executive Branch or the government. *Cf. Morrison*, 487 U.S. at 695 (upholding constitutionality of Ethics in Government Act against separation of powers challenge because Act gave "Attorney General several means of supervising or controlling the prosecutorial powers that may be wielded by an independent counsel"). To shift prosecutorial power from the Executive to the Judiciary in a criminal contempt action alleging violation of a court order presents separation of powers concerns; to allow the Legislature to shift the power entirely out of the hands of the sovereign presents due process concerns as well. Whatever incursion into due process and separation of powers principles this Court has been willing to tolerate in criminal contempt cases in order to enable courts to vindicate their authority, it has done so only to allow courts their limited right of self-preservation, and then only if they exercise "the least power adequate to the end proposed." *Young*, 481 U.S. at 801 (citations and quotations omitted). No such justification exists here. The lower court erred in concluding that the criminal contempt action brought against Mr. Robertson by Ms. Watson in her own name and in pursuit of her own private interests, cabined neither by the doctrine of necessity nor restraint, was lawful and constitutional. This Court should reverse.

CONCLUSION

A prosecution for criminal contempt in a federal court can only lawfully be brought in the name and interest of the United States; in Mr. Robertson's case, the United States had bargained away its right to do so. Because the lower court erred in holding that the criminal contempt proceeding against Mr. Robertson lawfully was brought by Ms. Watson in her own name and interest, the judgment of the District of Columbia Court of Appeals must be reversed.

Respectfully submitted,

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Appendix of Constitutional Provisions, Statutes and Rules

1. The United States Constitution, Article II, § 2, clause 1, states in pertinent part:

> The President . . . shall have Power to Grant Reprieves and Pardons for Offenses against the United States. . . .

2. The United States Constitution, Article III, § 2, clause 3, states:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

3. The United States Constitution, Article IV, § 2, clause 2, states:

> A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

4. The United States Constitution, Amendment V, states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand

> Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

5. The United States Constitution, Amendment VI, states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

6. D.C. Code § 1-206.02 (1981 & 1998 Supp.), states in pertinent part:

> § 1-206.02. Limitations on the Council.
>
> (a) The Council [of the District of Columbia] shall have no authority . . . to:
>
> * * *

> (3) Enact any act, or enact any act to amend or repeal any Act of Congress, which concerns the functions . . . of the United States. . . .
>
> * * *
>
> (8) Enact any act or regulation . . . relating to the duties or powers of the United States Attorney . . . for the District of Columbia. . . .
>
> * * *

7. D.C. Code § 16-1001 (1981 & 1998 Supp.), states in pertinent part:

> § 16-1001. Definitions.
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> For purposes of this subchapter:
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> (1) The term "complainant" means an individual in the relationship described in paragraph (5) who is the victim of an intrafamily offense and who files or for whom is filed a petition for protection under this subchapter.
>
> * * *
>
> (5) The term "intrafamily offense" means an act punishable as a criminal offense committed by an offender upon a person:
>
> > (A) to whom the offender is related by blood, legal custody, marriage, having a child in common, or with whom the offender shares or has shared a mutual residence; or

(B) with whom the offender maintains or maintained a romantic relationship not necessarily including a sexual relationship. A person seeking a protection order under this subparagraph shall reside in the District of Columbia or the underlying intrafamily offense shall have occurred in the District of Columbia.

(6) The term "respondent" means any person who is accused of having committed an intrafamily offense in a petition for protection filed under this subchapter.

8. D.C. Code § 16-1002 (1981 & 1998 Supp.), states:

§ 16-1002. Complaint of criminal conduct; referrals to Family Division.

(a) If, upon the complaint of any person of criminal conduct by another or the arrest of a person charged with criminal conduct, it appears to the United States Attorney for the District of Columbia (hereafter in this subchapter referred to as the "United States attorney") that the conduct involves an intrafamily offense, he shall notify the Director of Social Services. The Director of Social Services may investigate the matter and make such recommendations to the United States attorney as the Director deems appropriate.

(b) The United States attorney may also (1) file a criminal charge based upon the conduct and may consult with the Director of Social

Services concerning appropriate recommendations for conditions of release taking into account the intrafamily nature of the offense; or (2) refer the matter to the Corporation Counsel for the filing of a petition for civil protection in the Family Division. Prior to any such referral, the United States attorney shall consult with the Director of Social Services concerning the appropriateness of the referral.

(c) The institution of criminal charges by the United States attorney shall be in addition to, and shall not affect the rights of the complainant to seek any other relief under this subchapter. Testimony of the respondent in any civil proceedings under this subchapter and the fruits of that testimony shall be inadmissible as evidence in a criminal trial except in a prosecution for perjury or false statement.

9. D.C. Code § 16-1003 (1981 & 1998 Supp.), states:

§ 16-1003. Petition for civil protection.

(a) Upon referral by the United States attorney, or upon application of any person or agency for a civil protection order with respect to an intrafamily offense committed or threatened, the Corporation Counsel may file a petition for civil protection in the Family Division. In the alternative to referral to the Corporation Counsel, a complainant on his or her own initiative may file a petition for civil protection in the Family Division.

(b) In any matter referred to the Corporation Counsel by the United States attorney in which the Corporation Counsel does not file a petition, he shall so notify the United States attorney.

(c) Whenever a petition is filed by a complainant at his or her initiative or whenever private counsel enters an appearance in a case originally petitioned by the Corporation Counsel, the complainant or his or her counsel shall promptly notify the Corporation Counsel regarding the filing or entry of appearance.

(d) An action for an intrafamily offense under section 16-1001(5)(B) shall not be brought more than 2 years from the date the right to maintain the action accrues.

10. D.C. Code § 16-1005 (1981 & 1998 Supp.), states:

§ 16-1005. Hearing; evidence; protection order.

(a) Members of the family receiving notice shall appear at the hearing. In addition to the parties, the Corporation Counsel and the Director of Social Services may present evidence at the hearing in cases where the petition was filed by the Corporation Counsel.

(b) Notwithstanding section 14-306, in a hearing under this section, one spouse shall be a competent and compellable witness

against the other and may testify as to confidential communications, but testimony compelled over a claim of a privilege conferred by such section shall be inadmissible in evidence in a criminal trial over the objection of a spouse entitled to claim that privilege.

(c) If, after hearing, the Family Division finds that there is good cause to believe the respondent has committed or is threatening an intrafamily offense, it may issue a protection order –

(1) directing the respondent to refrain from the conduct committed or threatened and to keep the peace toward the family member;

(2) requiring the respondent, alone or in conjunction with any other member of the family before the court, to participate in psychiatric or medical treatment or appropriate counseling programs;

(3) directing, where appropriate, that the respondent avoid the presence of the family member endangered;

(4) directing a respondent to refrain from entering or to vacate the dwelling unit of the complainant when the dwelling is (A) marital property of the parties; or (B) jointly owned, leased, or rented and occupied by both parties; provided, that joint occupancy shall not be required if a party is forced by the

respondent to relinquish occupancy; or (C) owned, leased, or rented by the complainant individually; or (D) jointly owned, leased, or rented by the complainant and a person other than the respondent;

(5) directing the respondent to relinquish possession or use of certain personal property owned jointly by the parties or by the complainant individually;

(6) awarding temporary custody of a minor child of the parties;

(7) providing for visitation rights with appropriate restrictions to protect the safety of the complainant;

(8) awarding costs and attorney fees;

(9) ordering the Metropolitan Police Department to take such action as the Family Division deems necessary to enforce its orders;

(10) directing the respondent to perform or refrain from other actions as may be appropriate to the effective resolution of the matter; or

(11) combining two or more of the directions or requirements prescribed by the preceding paragraphs.

(c-1) For the purposes of subsection (c)(6) and (7) of this section, if the judicial officer finds by a preponderance of evidence that a

contestant for custody has committed an intrafamily offense, any determination that custody or visitation is to be granted to the abusive parent shall be supported by a written statement by the judicial officer specifying factors and findings which support that determination. In determining visitation arrangements, if the judicial officer finds that an intrafamily offense has occurred, the judicial officer shall only award visitation if the judicial officer finds that the child and custodial parent can be adequately protected from harm inflicted by the other party. The party found to have committed an intrafamily offense has the burden of proving that visitation will not endanger the child or significantly impair the child's emotional development.

(d) A protection order issued pursuant to this section shall be effective for such period up to one year as the Family Division may specify, but the Family Division may, upon motion of any party to the original proceeding, extend, rescind, or modify the order for good cause shown.

(e) Any final order issued pursuant to this section and any order granting or denying extension, modification, or rescission of such order shall be appealable.

(f) Violation of any temporary or permanent order issued under this subchapter and failure to appear as provided in subsection (a) shall be punishable as contempt.

(g) Any person who violates any protection order issued under this subchapter shall be chargeable with a misdemeanor and upon conviction shall be punished by a fine not exceeding $1,000 or by imprisonment for not more than 180 days, or both.

11. D.C. Code § 23-101 (1981 & 1998 Supp.), states in pertinent part:

§ 23-101. Conduct of prosecutions.

(a) Prosecutions for violations of all police or municipal ordinances or regulations and for violations of all penal statutes in the nature of police or municipal regulations, where the maximum punishment is a fine only, or imprisonment not exceeding one year, shall be conducted in the name of the District of Columbia by the Corporation Counsel for the District of Columbia or his assistants, except as otherwise provided in such ordinance, regulation, or statute, or in this section.

(b) Prosecutions for violations of section 6 of the Act of July 29, 1892 (D.C. Code, sec. 22-1107), relating to disorderly conduct, and for violations of section 9 of that Act (D.C. Code, sec. 22-1112), relating to lewd, indecent, or obscene acts, shall be conducted in the name of the District of Columbia by the Corporation Counsel or his assistants.

(c) All other criminal prosecutions shall be conducted in the name of the United States by the United States attorney for the District

of Columbia or his assistants, except as otherwise provided by law.

* * *

12. Rule 7 of the District of Columbia Superior Court Rules Governing Intrafamily Proceedings (superseded by the Rules Governing Proceedings in the Domestic Violence Unit), states in pertinent part:

Rule 7. Motions.

* * *

(c) *Motion for contempt for violation of protection order.* When a motion for contempt is filed alleging violation of a civil protection order or temporary protection order, the Intrafamily Clerk shall issue a notice of hearing and order directing appearance. The motion shall be in writing and shall be supported by affidavit. A statement of points and authorities shall not be required for a motion for contempt. The notice of hearing and order directing appearance shall be served in the same manner set forth in SCR Intrafamily 3. Punishment upon a finding of contempt shall be limited as provided in SCR Intrafamily 12(e).

* * *

13. Rule 9 of the District of Columbia Superior Court Rules Governing Intrafamily Proceedings

(superseded by the Rules Governing Proceedings in the Domestic Violence Unit), states in pertinent part:

> Rule 9. Conduct of hearings.
>
> (a) *Representation by counsel.* (1) By private counsel. Whenever a petition for a civil protection order or a motion pursuant to these rules is filed by a petitioner, at his or her initiative, the petitioner and the respondent may be represented by private counsel.
>
> (2) Representation by the Corporation Counsel. Whenever a petition for a civil protection order or a motion pursuant to these rules is filed by the Corporation Counsel, the Corporation Counsel shall represent the petitioner unless private counsel enters an appearance in the case or the Court permits the Corporation Counsel to withdraw.
>
> * * *

14. Rule 12 of the District of Columbia Superior Court Rules Governing Intrafamily Proceedings (superseded by the Rules Governing Proceedings in the Domestic Violence Unit), states in pertinent part:

> Rule 12. Contempt.
>
> * * *
>
> (b) *Violation of protection order.* A motion alleging one or more violations of a temporary protection order or civil protection order shall be filed and served pursuant to Rule 7(c).

(c) *Contempt hearing procedures.* (1) The respondent has the right to counsel and shall be so advised.

(2) Anytime the judge contemplates imposing a sentence of imprisonment if the contempt is proven beyond a reasonable doubt, the judge may appoint counsel for the respondent. The Court may also request that the Corporation Counsel represent the petitioner.

(3) If the respondent requests a continuance the judge may grant the continuance on any one or all of the following conditions:

(A) That any existing temporary protection order or civil protection order be extended.

(B) That additional conditions to ensure the safety of the moving party be imposed (e.g., vacation of the premises pending the continuance; a temporary total ban on visitation; awarding temporary custody of a minor child of the parties),

(C) That the respondent receive no further continuances.

(4) Both parties have the right to present sworn testimony of witnesses and other evidence in support of or in opposition to the motion. The respondent may not be compelled to testify or give evidence.

* * *

(e) *Punishment upon finding of contempt by the Division.* Contempt may be unpunished by a fine or penalty of not more than $300.00 or by imprisonment for not more than six (6) months, or both.

RESPONDENT'S BRIEF

Supreme Court U.S.
MAR 1 - 2010
OFFICE OF THE CLERK

No. 08-6261

IN THE
Supreme Court of the United States

JOHN ROBERTSON,
Petitioner,

v.

WYKENNA WATSON,
Respondent.

ON WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR RESPONDENT

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March 2010

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QUESTION PRESENTED

Whether an action for criminal contempt in a congressionally created court may constitutionally be brought in the name and pursuant to the power of a private person, rather than in the name and pursuant to the power of the United States.

PARTIES TO THE PROCEEDING

The Petitioner in this case is John Robertson, who was the Appellant in the Court of Appeals and the Defendant-Respondent in the trial court. The Respondent is Wykenna Watson, who was the Appellee in the Court of Appeals and the Petitioner in the trial court.

In Respondent's view, the caption that Petitioner has given to the case in this Court, *John Robertson* v. *United States* ex rel. *Wykenna Watson*, does not accurately describe the parties to the proceeding. While the United States has appeared as an *amicus curiae* in the court of appeals and in this Court, it is not a party to this proceeding.

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BRIEF OF RESPONDENT

STATEMENT

1. Civil Protection Orders In The District Of Columbia. Domestic violence is a serious and widespread problem. Each year, approximately 4.8 million women in the United States are the victims of domestic violence. U.S. Dep't of Justice, *Extent, Nature and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey* at iii (2000). Domestic violence accounts for nearly a fifth of all nonfatal violent crime against women, and for nearly a third of all murders of women in the United States. *See* U.S. Dep't of Justice, NCJ 197838, *Bureau of Justice Statistics Crime Data Brief: Intimate Partner Violence, 1993-2001* at 1 (2003).

Civil Protection Orders ("CPOs") are a primary legal tool used to protect victims of domestic violence. *See* D.C. Code Ann. § 16-1001 *et seq.*[1] The District of Columbia's CPO law, originally enacted by Congress in 1970, was the first in the Nation to authorize CPOs in domestic violence cases. *See* Pub. L. No. 91-358, 84 Stat. 473, 545-48. All 50 States now authorize their courts to issue CPOs to protect victims of domestic abuse. *See* Jeffrey R. Baker,

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[1] Unless otherwise noted, references to District of Columbia law and court rules are to the version in effect at the time of Petitioner's violation of the CPO and contempt conviction.

Enjoining Coercion: Squaring Civil Protection Orders with the Reality of Domestic Abuse, 11 J.L. & Fam. Stud. 35, 38 (2008).

In the District of Columbia, a court may issue a CPO if it finds, after notice and hearing, "that there is good cause to believe that the respondent has committed or is threatening an intrafamily offense." D.C. Code Ann. § 16-1005(c) (1999), Pet. Br. App. 7.[2] A CPO may include, among other provisions, directions to the respondent to "refrain from the conduct committed or threatened," "to keep the peace toward the family member," "to avoid the presence of the family member endangered," or "to refrain from entering or to vacate the dwelling unit of the complainant." *Id.*, Pet. Br. App. 7-8.

As originally enacted, the statute authorized the Corporation Counsel of the District of Columbia to petition for a CPO.[3] In 1982, the Council of the

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[2] The statute defines an "intrafamily offense" as any "act punishable as a criminal offense committed by an offender upon a person . . . to whom the offender is related by blood, legal custody, marriage, having a child in common, or with whom the offender shares or has shared a mutual residence;" or . . . "with whom the offender maintains or maintained a romantic relationship." D.C. Code Ann. § 16-1001(5) (1999), Pet. Br. App. 3-4.

[3] The Corporation Counsel is now known as the Attorney General of the District of Columbia. In this brief, we generally refer to the "D.C. Attorney General" rather than the "Corporation Counsel."

District of Columbia amended the law to expand the protection that it affords to victims of domestic abuse.[4] Among other changes, the 1982 amendments authorized victims of domestic violence to seek CPOs on their own initiative. Pet. App. A.vi-viii & n.2; *Green* v. *Green*, 642 A.2d 1275, 1279 n.7 (D.C. 1994). The amended law expressly provides that "[t]he institution of criminal charges by the United States attorney shall be in addition to, and shall not affect the rights of the complainant to seek any other relief under this subchapter." D.C. Code Ann. § 16-1002(c), Pet. Br. App. 5.

The Council "determined that it was essential to strengthen the law regarding intrafamily offenses because '[e]xisting remedies have been shown to be inadequate in aiding victims in preventing further abuse.'" Pet. App. A.vii (quoting Report of the Council of the District of Columbia Committee on the Judiciary on Bill 4-195, The Proceeding Regarding Intrafamily Offenses Amendment Act of 1982, at 2 (May 12, 1982) ("D.C. Judiciary Comm. Report")). More than a decade of experience with the law had demonstrated that the D.C. Attorney General "was unable to meet the demand for the growing number

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[4] Congress created the D.C. Council in 1973 and delegated to it legislative authority over the District of Columbia. *See* District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act). Pub. L. No. 93-198, 87 Stat. 774 (Dec. 24, 1973).

of CPOs." *Green*, 642 A.2d at 1279 n.7. The amendment was supported by "virtually all commentators," including the U.S. Attorney and the D.C. Attorney General, and was intended to "facilitate the effectiveness of the civil protection remedy by not requiring all alleged victims to go through the already heavily burdened Office of the [D.C. Attorney General]." *Green*, 642 A.2d at 1279 (quoting D.C. Judiciary Comm. Report at 10).

Violations of a CPO "shall be punishable as contempt." D.C. Code § 16-1005(f), Pet. Br. App. 9. At the time of Robertson's attack, the maximum punishment for contempt was a $300 fine and six months imprisonment. D.C. Sup. Ct. Intrafamily R. 12(e) (1999), Pet. Br. App. 14.[5] A motion for contempt alleging a violation of a CPO must be "in writing," "supported by affidavit," and served upon the respondent. D.C. Sup. Ct. Intrafamily R. 7(c) & 12(b) (1999), Pet. Br. App. 11-12.[6] The respondent

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[5] Contempt is now punishable by a fine not exceeding $1,000, imprisonment for not more than 180 days, or both. D.C. Code Ann. § 16-1005(f) (2009). Violation of a CPO is also punishable as a misdemeanor. DC. Code Ann. § 16-1005(g) (1999), Pet. Br. App. 10.

[6] The current version of the rules provides: "A motion requesting that the court order a person to show cause why she/he should not be held in criminal contempt for violation of a temporary protection order or civil protection order may be filed by an individual, [the D.C. Attorney General] or an attorney (continued...)

has a right to counsel, and must be advised of this right. D.C. Sup. Ct. Intrafamily R. 12(c)(1), Pet. Br. App. 13. The judge may appoint counsel for the respondent, and may also "request that the [D.C. Attorney General] represent the petitioner." D.C. Sup. Ct. Intrafamily R. 12(c)(2), Pet. Br. App. 13. Both parties may present witnesses and other evidence, and the respondent may not be compelled to testify or give evidence. D.C. Sup. Ct. Intrafamily R. 12(c)(4), Pet. Br. App. 13.

In *Green*, the D.C. Attorney General's Office reported to the court of appeals that it "prosecute[d] less than 10 percent of the criminal contempt motions brought for violations of civil protection orders, and ha[d] only one counsel available for that duty." 642 A.2d at 1279 n.7 (quoting post-argument submission of the D.C. Attorney General). The D.C. Attorney General's Office stated that it "would be hard pressed to prosecute all of the contempt motions filed in D.C. Superior Court given the current limited state of [its] resources." *Id.* It explained that it was "unable to draw on the resources of the section that handles perhaps the most nearly analogous work, because the ten attorneys in that section handle approximately 1,000 abuse and neglect cases per month." *Id.* Moreover, the D.C. Attorney General stated that "volunteer

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appointed by the [c]ourt for that purpose." D.C. Sup. Ct. Domestic Violence R. 12(d) (2005), C.A. App. 95.

assistance efforts from other divisions" of the Office "could not possibly [provide the] additional resources needed to prosecute all contempt motions." *Id.* The court of appeals noted these statements by the D.C. Attorney General's Office in an opinion holding that D.C. law authorizes private parties to initiate criminal contempt proceedings for violation of a CPO. *See id.*

2. Robertson's First Attack On Ms. Watson And The Civil Protection Order. On March 27, 1999, Petitioner John Robertson attacked Respondent Wykenna Watson inside Ms. Watson's home. J.A. 12. Robertson "struck Ms. Watson . . . approximately 20 to 30 times" with a closed fist and "kicked [her] in the head several times while wearing heavy work shoes." *Id.* at 40. Robertson "also pulled out a pocket knife, blade approximately 4 inches long, and threatened to kill" Ms. Watson. *Id.* at 12; *see also* Pet. App. A.iii. Ms. Watson attempted to flee during the attack, but Robertson followed her and "continued to beat her with his fists and also kicked her repeatedly." J.A. 12.

Robertson's attack on Ms. Watson left her severely injured. She suffered "a broken bone in her nose, a hole in her sinus area, . . . a broken lip, numerous lacerations and bruises about her body, and "damage to one of her eyes." J.A. 40. As a result of damage to her retina, "Ms. Watson's vision was impaired." *Id.*

On March 29, 1999, two days after the attack, Ms. Watson filed a Petition and Affidavit for a CPO

in the Superior Court. J.A. 11-17. That same day, the court issued a temporary protection order. Pet. App. A.iii. On April 26, following a hearing, the court issued a CPO ordering Robertson not to assault, threaten, harass, or physically abuse Ms. Watson; to stay away from Ms. Watson's person, home, and workplace; and to avoid contacting her. Pet. App. A.iii-iv; J.A. 20-25. Ms. Watson was represented by the D.C. Attorney General's Office during this proceeding. Pet. App. A.iv.

3. Robertson's Second Attack On Ms. Watson And The Contempt Proceeding. On June 26, 1999 (and continuing into the early morning hours of June 27), Robertson attacked Ms. Watson a second time, in violation of the CPO. Robertson "harassed" Ms. Watson "by repeatedly cursing her" and "repeatedly demanding that [she] drop the criminal charges that were pending against him." Pet. App. A.iv-v. This verbal attack was accompanied by a vicious assault. After repeatedly punching Ms. Watson in the face and pushing her into a wall, Robertson threw industrial strength drain cleaner on her neck and face. J.A. 56-57. The drain cleaner caused lye burns, which resulted in Ms. Watson's hospitalization in an intensive care unit. *Id.*

On January 28, 2000, Ms. Watson, again represented by the D.C. Attorney General, filed a motion to adjudicate Robertson in criminal contempt for violating the CPO. Pet. App. A.iv; J.A. 56-60. Following a bench trial at which Ms. Watson and two other witnesses testified, the court found beyond a

reasonable doubt that Robertson had willfully violated the CPO. Pet. App. A.v.

The court found Robertson guilty on three of the five contempt allegations. The court found that he violated the CPO by throwing drain cleaner on Ms. Watson and by "harass[ing] Ms. Watson by making his request that she drop criminal charges and calling her names and . . . by pushing her into a wall." *Id.* The court rejected Robertson's claim of self-defense, finding that he did not throw the drain cleaner onto Ms. Watson until after she "was down on the ground bleeding badly," and he "had won the fight convincingly." *Id.* at v-vi. Noting that all parties "were cursing and behaving in . . . an abominable fashion," the court found Robertson not guilty of two additional alleged violations of the CPO. *Id.* at v.

The court sentenced Robertson to three consecutive 180-day jail terms, but suspended execution of one of the sentences in favor of five years of probation. *Id.* at vi. The court also ordered Robertson to pay $10,009.23 in restitution to repay medical expenses incurred by Ms. Watson. *Id.*

4. The Plea Agreement. On July 8, 1999, a grand jury indicted Robertson on charges arising out of his first attack on Ms. Watson. Robertson was charged with one count of aggravated assault and two counts of assault with a dangerous weapon. Pet. App. A.iv; J.A. 26-27.

On July 20, 1999, Robertson entered into a plea agreement with the United States Attorney's

Office in which he agreed to plead guilty to one count of felony attempted aggravated assault. J.A. 28-30. The plea agreement was signed by an Assistant United States Attorney. *Id.* at 30. The words "District of Columbia" (which appeared below the words "United States" on the pre-printed form) as well as the words "Assistant Corporation Counsel" (which appeared below the words "Assistant United States Attorney") were crossed out. Pet. App. A.xviii; J.A. 30. The plea agreement included a handwritten notation that 'In exchange for [Petitioner's] plea of guilty to Attem[pted] Aggravated Assault, the gov't agrees . . . not [to] pursue any charges concerning an incident on 6-26-99." Pet. App. A.xviii; J.A. 28. On November 15, 1999, the Superior Court sentenced Petitioner to imprisonment for one to three years. J.A. 53-55.

Robertson never raised the plea agreement as a defense to the criminal contempt proceedings. More than three years later, he filed a motion pursuant to D.C. Code § 23-110 seeking to vacate his criminal contempt convictions on the ground that they violated his plea agreement with the U. S. Attorney's Office. The Superior Court denied the motion. J.A. 89-93.

5. The Court Of Appeals' Decision. The District of Columbia Court of Appeals affirmed Robertson's contempt conviction and the denial of his Section 23-110 motion. Pet. App. A.i-xxiii. Robertson contended that his prosecution for criminal contempt breached his plea agreement because the United States, rather than Ms. Watson,

was "the true party in interest to the contempt proceeding." *Id.* at ix. The court noted that D.C. law grants "victims of intrafamily offenses a central role in the enforcement of the intrafamily offenses statute," and that the D.C. Attorney General "lacked the resources to meet the increasing demands for protection under the intrafamily offenses statute." Pet. App. A.xii, quoting *Green*, 642 A.2d at 1279-80 n.7.

The court concluded that "the unique statute governing intrafamily offenses, which authorizes an individual to file a motion to adjudicate criminal contempt against one who violates a CPO, does not contravene the general principle that criminal prosecutions are prosecuted in the name of the sovereign, the United States, or where statutes specify, the District of Columbia." Pet. App. A.xiv-xv. Accordingly, the court held that "under the intrafamily offense statute, a criminal contempt proceeding is properly brought in the name of a private person . . . rather than in the name of the sovereign." *Id.* at xv. The court noted that a similar statutory enforcement framework applies to child support orders in the District. *Id.*, citing D.C. Code § 46-225.02(a) (2005).

In interpreting the plea agreement, the court applied contract principles and looked to the language of the agreement to determine the parties' intent. Pet. App. A.xvii-xviii. The court noted that "[t]he District of Columbia, whose name appeared under that of the United States, was crossed out"; similarly, "[t]he words 'Assistant Corporation

Counsel,' which appeared under the words 'Assistant U.S. Attorney,' were crossed out." *Id.* at xviii. "[T]he pertinent handwritten narrative stated 'In exchange for Mr. Robert[son's] plea of guilty to Attem[pted] Aggravated Assault, the gov't agrees . . . not [to] pursue any charges concerning an incident on 6-26-99.'" *Id.* The court determined that "[t]he abbreviated word 'gov't' clearly referred to the United States, not Ms. Watson and certainly not the District of Columbia, since that name was deleted." *Id.* The court held that "no objectively reasonable person could understand that Mr. Robertson's plea agreement bound Ms. Watson and precluded her contempt proceeding against Mr. Robertson, or that the agreement bound the District, a distinct, separate governmental entity." *Id.* at xix.

The court found additional support for its conclusion in the language of D.C. Code § 16-1002(c), which provides that "[t]he institution of criminal charges by the United States Attorney shall . . . not affect the rights of the [CPO] complainant to seek any other relief under this subchapter." *Id.* at xix n.7. "[R]elief under this subchapter," the court noted, includes an adjudication of criminal contempt for violation of a CPO. *Id.*, citing D.C. Code § 16-1005(f).[7]

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[7] The court of appeals also rejected Petitioner's arguments that he received ineffective assistance of counsel, that he was (continued...)

SUMMARY OF THE ARGUMENT

1. No provision of the Constitution expressly requires that criminal contempt proceedings be brought "in the name of and pursuant to the power of the United States." Pet. Br. i. Petitioner nevertheless contends that: (i) the Constitution uses general terms, such as "crimes," that incorporate the common law understanding of crime, and (ii) the common law required all crimes, including contempt, to be prosecuted in the name of the sovereign. Petitioner is wrong on both counts.

a. When the Constitution uses common law terms, it does not incorporate every feature of the common law into the Constitution. *See Williams* v. *Florida*, 399 U.S. 78, 97-98 (1970) (holding that the Sixth Amendment right to trial by jury does not include the common law right to a 12-person jury). When the Framers intended to incorporate aspects of the common law of crime into the Constitution, they did so expressly. The Court's reasoning in *Williams*, which considered a specific common law right that is expressly included in the Constitution, applies with even greater force to general terms such as "crimes."

b. There was (and is) no settled common law understanding that criminal contempt proceedings must be brought in the name of the sovereign. The

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entitled to a jury trial, and that the trial court misapplied the law of self-defense. Pet. App. A at xix-xxiii.

authorities agree on two points. *First*, the practice of naming criminal contempt proceedings is not harmonious. Many courts expressly hold that criminal contempt proceedings need not be brought in the name of the sovereign. *Second*, the caption of a criminal contempt proceeding is a relatively unimportant matter, because it does not prejudice the alleged contemnor.

Petitioner's argument rests on an incorrect assertion that there are no relevant differences between criminal contempt proceedings and other criminal proceedings. The Framers would not have regarded a petty criminal contempt as a "crime" at all. *See Ex parte Burr*, 4 F. Cas. 791, 797 (C.C. D.C. 1823). Although the Court has extended a range of constitutional protections to non-summary criminal contempt proceedings, those proceedings differ from other criminal proceedings in a variety of ways: They arise from violation of a court order rather than a statute; they vindicate the authority of the court rather than punishing conduct proscribed by a general criminal law; they may be initiated by the court; there is no right to grand jury indictment; and they may be punished summarily if they occur in open court. Thus, while the Court has referred to criminal contempt as a "crime in the ordinary sense," it has explained that this statement describes the "criminal character of contempt prosecutions," and does not erase the differences between criminal contempt and other crimes. *See Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 799-800 (1987).

Contrary to Petitioner's assertion, this Court's decisions in *Gompers* and *Dixon* do not require a contrary conclusion. *Gompers* held that a criminal sentence is not an appropriate remedy for a civil contempt proceeding in equity. *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418, 451-52 (1911). *Dixon* held that a criminal contempt conviction under D.C. Code § 16-1005(f) can trigger a Double Jeopardy bar to a subsequent prosecution based on the same incident. Neither decision holds that criminal contempt proceedings must be brought in the name of the sovereign.

c. Far from "construct[ing] an alternative universe . . . of a type never contemplated by the Framers," Pet. Br. 15, the District's CPO enforcement system would have been entirely familiar to the Framers. By long-established common law tradition, private persons and their counsel were authorized to prosecute criminal cases without the involvement of public prosecutors.

d. In the court below, Petitioner did not contend that criminal contempt prosecutions must be brought "pursuant to the power of the United States," and those words do not appear in the court of appeals' opinion. Even if Respondent was acting "pursuant to the power of the United States," she was not "the government" under any reasonable interpretation of the plea agreement. Respondent is neither a government employee nor the "government." *Cf. Richardson* v. *McKnight*, 521 U.S. 399 (1997) (distinguishing between private prison guards and government employees).

2. Petitioner's separation of powers and due process arguments were not properly raised in the courts below, and therefore should not be considered by this Court. Moreover, these arguments lack merit.

a. Petitioners' contention that the District's CPO system violates constitutional separation of powers principles is incorrect for two reasons.

First, separation of powers principles do not apply to the District of Columbia. The Constitution separates and divides powers among the three branches of the *federal* government. The Constitution assigns no powers concerning the District of Columbia to the Executive or Judicial Branches. Instead, it grants Congress power to "exercise exclusive Legislation in all Cases whatsoever." U.S. Const. Art. I § 8, cl. 17. The Court has recognized that this provision grants Congress "entire control over the [District] for every purpose of government." *Kendall* v. *United States ex rel. Stokes*, 37 U.S. 524, 618 (1838).

Second, even if constitutional separation-of-powers principles applied, they would not invalidate the District's law. This Court has expressly rejected the argument that "any prosecution of contempt must . . . be considered an execution of the criminal law in which only the Executive Branch may engage." *Young*, 481 U.S. at 799-800. The power to prosecute violation of a court's order does not "eradicate fundamental separation-of-powers

boundaries" because it reaches only the parties to court orders, not the "entire population." *Id.* at 800 n.10. Here, the power at issue applies only to CPO orders, not all court orders.

b. Petitioner incorrectly asserts that he has a due process right to be prosecuted by the government rather than a private prosecutor. In *Young*, the Court held that courts have inherent authority to initiate criminal contempt proceedings. Petitioner has expressly declined to raise the question whether the Constitution prohibits a private, interested prosecutor from prosecuting a criminal contempt action. Accordingly, this Court should not decide that question. Multiple characteristics of the District's CPO contempt system support a determination that the system is constitutional. *First*, a decade of experience with the CPO system demonstrated that other approaches to ensuring the effectiveness of CPOs in domestic violence cases are inadequate. *Second*, contempt of a CPO order is a petty offense, and thus is entitled to a lesser degree of constitutional protection. *Third*, alleged contemnors receive fundamental constitutional protections, including notice, the right to counsel, the right to present evidence, and the right not to incriminate oneself. *Fourth*, the private party does not exercise a "wide-ranging discretion," because the court exercises substantial control over the proceeding.

ARGUMENT

Petitioner asks this Court to decide whether the Constitution requires actions for criminal contempt in a "congressionally created court" to be "brought in the name and pursuant to the power of the United States." Pet. Br. i. That question arises in a specific legal and factual context: Petitioner contends that his criminal contempt conviction for violating the CPO breached his plea agreement with the U.S. Attorney's Office, which provided that "the gov't agrees to . . . not pursue any charges concerning an incident on 6-26-99." J.A. 28. As explained below, there is no settled common law understanding, let alone a constitutional requirement, that criminal contempt proceedings be brought "in the name of the United States." Accordingly, the contempt proceeding in this case did not violate Petitioner's plea agreement. Petitioner's additional arguments that the contempt proceeding violated constitutional separation-of-powers and due process requirements were not properly raised in the courts below and lack merit.

I. The Constitution Does Not Require That Contempt Be Prosecuted In The Name And Power Of The Sovereign.

The Constitution does not expressly provide that criminal contempts must be prosecuted in the name and pursuant to the power of the sovereign. Petitioner does not contend otherwise. Instead, he argues that "[t]he many references in the Constitution to crimes, offenses, criminal cases, and

criminal prosecutions reflect settled common-law principles and definitions entirely familiar to the framing generation." Pet. Br. 14-15. According to Petitioner, "settled common law principles" familiar to the Framers required that all crimes, including criminal contempts, be prosecuted in the name of the sovereign, and these common law principles were incorporated into the Constitution through the use of terms such as "crimes." *Id.*

Petitioner is wrong on both counts. There was (and is) no "settled" common law principle that criminal contempt proceedings must be brought in the name of the sovereign. Even if such a requirement had existed, it would not have been incorporated into the Constitution through the use of general terms such as "crimes."

A. The Constitution Does Not Mandate That Contempt Proceedings Adhere To Common Law Practice And Procedure.

This Court has observed that the "language of the Constitution . . . could not be understood without reference to the . . . common law, the principles and history of which were familiarly known to the Framers of the Constitution." *Schick* v. *United States*, 195 U.S. 65, 69 (1904). It does not follow from this observation, however, that the use of general terms such as "crimes" incorporates into the Constitution the entire common law of crimes. To the contrary, the Court has held that even when the Framers expressly included specific common law

rights in the Constitution, they did not incorporate all the common law features of those rights.

In *Williams* v. *Florida*, 399 U.S. 78 (1970), the Court considered whether the Sixth Amendment right to a jury trial "necessarily requires trial by exactly 12 persons." *Id.* at 86. The Court acknowledged that "at common law the jury did indeed consist of 12," and also recognized that in earlier decisions the Court had suggested in *dicta* that this aspect of the common law was incorporated into the Sixth Amendment. *Id.* at 91 (collecting citations). The Court nevertheless held that the Sixth Amendment right to a jury trial does not incorporate the common law right to a 12-person jury.

"Noticeably absent" from the Court's earlier decisions "was any discussion of the essential step in the argument: namely, that every feature of the jury as it existed at common law—whether incidental or essential to that institution—was necessarily included in the Constitution wherever that document referred to a 'jury.'" *Id.* at 91. The Court noted that "where Congress wanted to leave no doubt that it was incorporating existing common-law features of the jury system, it knew how to use express language to that effect." *Id.* at 97. Because the Framers never suggested that they expected a jury to have 12 members, "there [was] absolutely no indication in 'the intent of the Framers' of an explicit decision to equate the constitutional and common-law characteristics of the jury." *Id.* at 99. The Court concluded that a 12-person jury "cannot be regarded

as an indispensable component of the Sixth Amendment," and therefore is not constitutionally required. *Id.* at 100.[8]

The Court's reasoning in *Williams* applies with even greater force to this case. *Williams* considered a specific common law right that is expressly included in the Constitution. In contrast, Petitioner's argument is based on the Framers' use of general terms such as "crimes." When Congress wanted to include in the Bill of Rights a particular feature of the common law of "crime," it used express language. *See, e.g.*, *Klopfer* v. *North Carolina*, 386 U.S. 213, 223-26 (1967) (noting the Framer's familiarity with the long common law history of the right to a speedy trial); William Blackstone, 4 Commentaries on the Laws of England *302-06 (1769) ("*Commentaries*") (describing the role of the grand jury in English common-law indictments); *id.* at *335 (recognizing "the universal maxim of the common law of England, that no man is to be

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[8] The Court has followed the same approach in interpreting the Seventh Amendment right to a jury trial. *See, e.g.*, *Colgrove* v. *Battin*, 413 U.S. 149, 155-56 n.10 (1973). The Seventh Amendment does not "bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791." *Galloway* v. *United States*, 319 U.S. 372, 390 (1943). Instead, "[n]ew devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice." *In re Peterson*, 253 U.S. 300, 309-310 (1920).

brought into jeopardy of his life more than once for the same offence"). Had the Constitution's use of the term "crime" incorporated the entirety of the common law understanding of "crime," there would have been no reason to include these protections separately.[9]

In *Williams*, the Court explained that its "holding does no more than leave these considerations to Congress and the States." *Id.* at 103. The same principle applies in this case. The Council of the District of Columbia, exercising power delegated to it by Congress,[10] adopted a law that

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[9] The Sixth Amendment demonstrates that the Framers did not understand that they were incorporating all aspects of the common law terms used in the Constitution. Article III provides that "[t]he Trial of all crimes shall be by Jury." U.S. Const. Art III. In response to criticism regarding Article III's failure "to preserve the common-law right to be tried by a 'jury of the vicinage,'" Madison explained that "the omission was deliberate" and that "[i]t must . . . be left to the discretion of the legislature to modify it according to circumstances." *Williams*, 399 U.S. at 93 & n.3 (quoting 3 M. Farrand, Records of the Federal Convention 332 (1911)). Madison's view that the issue should be left to Congress did not prevail, and the Sixth Amendment was adopted to provide a right to trial "by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI.

[10] The Constitution authorizes Congress to "exercise exclusive Legislation in *all* Cases whatsoever" for the District of Columbia. U.S. Const. art. I, § 8, cl. 17. (emphasis added). When considering the constitutionality of laws enacted by the (continued...)

addresses the serious problem of domestic violence. D.C. Code §§ 16-1001 to 1005. In its original form, the law did not permit private individuals to file a petition for a civil protection order or to seek enforcement of such an order. D.C. Code § 16-1003(a) (1971); Pub. L. No. 91-358, 84 Stat. 473, 546 (July 29, 1970). More than a decade of experience demonstrated that exclusive reliance on public prosecutors was "inadequate in aiding victims in preventing further abuse." *Green*, 642 A.2d at 1279 n.7 (quoting D.C. Judiciary Comm. Report at 2).

The Council's amendment authorizing victims of domestic violence to seek CPOs was supported by the U.S. Attorney, the D.C. Attorney General, and "virtually all commentators." *Green*, 642 A.2d at 1279 n.7 (quoting D.C. Judiciary Comm. Report at 10). The amended law reflects "a determination by the Council that the beneficiary of a CPO should be permitted to enforce that order through an intrafamily contempt proceeding." *Green*, 642 A.2d at 1279; *see also* D.C. Sup. Ct. Domestic Violence R. 12(d) (2005), C.A. App. 95. The use of general terms such as "crimes" in the Constitution does not prohibit legislatures from adopting such innovative measures to deal with serious social problems.

Council pursuant to authority delegated by Congress, the Court analyzes the law as though it "had been passed directly by Congress." *Welch* v. *Cook*, 97 U.S. 541, 542 (1878).

B. There Is No Constitutional Requirement That Contempt Be Prosecuted In The Name Of The Sovereign.

There is no settled common law understanding, let alone a constitutional requirement, that criminal contempt proceedings must be brought in the name of the sovereign. Petitioner's argument to the contrary rests on an erroneous assertion that there are no relevant differences between criminal contempt and other criminal proceedings.

1. Contempts Were Not Viewed As "Crimes" By The Framers, And Still Differ From Other Crimes In Important Respects.

Relying on this Court's statement that "[c]riminal contempt is a crime in the ordinary sense," Petitioner contends that there is no relevant distinction between criminal contempt and other crimes. *See, e.g.*, Pet. Br. 36 (quoting *Bloom* v. *Illinois*, 391 U.S. 194, 201 (1968)). In fact, there are a number of important differences between contempt proceedings and other criminal proceedings, as this Court has recognized.

a. As an initial matter, the Framers would not have understood contempt to be a "crime." As Chief Judge Cranch (this Court's reporter from 1801-1815) explained, "cases of contempt of court have never been considered as crimes within the meaning and intention of the second section of the third article of

the constitution of the United States; nor have attachments for contempt ever been considered as criminal prosecutions within the sixth amendment." *Ex parte Burr*, 4 F. Cas. 791, 797 (C.C. D.C. 1823).

Chief Judge Cranch observed that many of the Framers were members of the First Congress, which enacted the Judiciary Act of 1789. *Id.* That Act authorized the courts of the United States "to punish by fine and imprisonment, at the discretion of the said courts, all contempts of authority in any cause or hearing before the same." *Id.*; Judiciary Act of 1789, § 17, 1 Stat. 73, 83. Had the Framers believed that terms such as "crimes" in the Constitution applied to contempts, they would not have violated the constitutional command that "Trial of all Crimes . . . shall be by Jury", U.S. Const. art. III § 2, by authorizing summary punishment of contempt.

There is a second reason why the Framers would not have regarded the contempt in this case as a "crime": It was a petty criminal offense, subject to a maximum sentence of six months' imprisonment. *See* D.C. Sup. Ct. Intrafamily R. 12(e) (1999), Pet. Br. App. 14. In *Schick* v. *United States*, the Court looked to the common law to interpret the term "crime" in the Sixth Amendment. 195 U.S. 65 (1904). The Court adopted Blackstone's definition of "crime," noting that under the common law "'the word "crimes" is made to denote such offenses as are of a deeper and more atrocious dye; while smaller faults and omissions of less consequence are comprised under the gentler name of "misdemeanors" only.'" *Id.* at 69-70 (quoting 4 *Commentaries* at *5).

Because the Sixth Amendment guaranteed only a right to trial in "criminal" cases, the Court held that, "in the light of the popular understanding of the meaning of the word 'crimes,' as stated by Blackstone, it is obvious that the intent was to exclude from the constitutional requirement of a jury the trial of petty criminal offenses." *Id.* at 70.

b. This Court adhered to the Framers' understanding of contempt until well into the twentieth century. *See, e.g., Green* v. *United States*, 356 U.S. 165, 186-87 (1958); *see also id.* at 189-92 (Frankfurter, J., concurring) (collecting cases). The Court observed that contempt is "an offense *sui generis*." *E.g., Frank* v. *United States*, 395 U.S. 147, 151 n.5 (1969) (quoting *Cheff* v. *Schnackenberg*, 384 U.S. 373, 379-80 (1966)). "Contempts are neither wholly civil nor altogether criminal." *Gompers* v. *Buck's Stove & Range*, 221 U.S. 418, 441 (1911). "'[I]t may not always be easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both.'" *Id.* (quoting *Bessette* v. *W.B. Conkey Co.*, 194 U.S. 324, 329 (1904). Even criminal contempt "proceedings are not intended to punish conduct proscribed as harmful by the general criminal laws. Rather, they are designed to serve the limited purpose of vindicating the authority of the court." *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 800 (1987).

In *Bloom* v. *Illinois*, the Court held that criminal contempt is a crime for purposes of the jury trial provisions of the Constitution, and in the course

of its opinion observed that criminal contempt is "a crime in the ordinary sense." 391 U.S. at 201. As the Court later explained this "insistence on the criminal character of contempt prosecutions" was "intended to rebut earlier characterizations of such actions as undeserving of the protections normally provided in criminal proceedings," not to suggest that there are no distinctions between criminal contempt and other crimes. *Young*, 481 U.S. at 800. This Court's decisions have recognized that contempt proceedings, including criminal contempt proceedings, differ from ordinary criminal proceedings in important ways:

- Contempts committed in open court may be punished summarily, without "a hearing, counsel, and the opportunity to call witnesses." *Pounders* v. *Watson*, 521 U.S. 982, 988 (1977); *see also In re Oliver*, 333 U.S. 257, 275 (1948); *Cooke* v. *United States*, 267 U.S. 517, 534-35 (1925).

- Criminal contempt proceedings may be initiated by the court on its own motion. *Young*, 481 U.S. at 800-01.

- There is no right to a grand jury indictment in contempt cases. *Green*, 356 U.S. at 184.

- Although "[f]ederal crimes are defined by Congress, not the courts," *United States* v. *Lanier*, 520 U.S. 259, 267 n.6 (1997), contempt is defined

by the content of the court's order, not by a statute.[11]

- For contempts, unlike other crimes, there may be no "statutory limitation of the amount of a fine or the length of a prison sentence which may be imposed for their commission." *Green* , 356 U.S. at 187.

In short, the Court's statement that contempt is a "crime in the ordinary sense" does not eliminate all differences between contempt and other crimes, and does not require that criminal contempt proceedings be identical in all respects to other criminal proceedings.

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[11] Section 401 of Title 18, U.S. Code defines contempt in terms of the "[p]ower" "of the court" to "punish by fine or imprisonment, or both, at its discretion," contempt of its authority such as "[m]isbehavior of any person in its presence or so near thereto as to obstruct the administration of justice." 18 U.S.C. § 401. Section 402 of Title 18, which prescribes certain procedures for contempts that consist of violating a court order where the act also violates a criminal statute, expressly recognizes that "all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law." *Id.* § 402.

2. The Common Law Did Not Require That Criminal Contempt Proceedings Be Brought In The Name Of The Sovereign.

Although Petitioner purports to base his argument on "settled common law principles," there was (and is) no settled common law principle requiring criminal contempt proceedings to be brought in the name of the sovereign. To the contrary, the practice has long been described as "not harmonious." Stewart Rapalje, A Treatise on Contempt § 95 (1884); *see also Gompers*, 221 U.S. at 446 ("the practice has hitherto been . . . unsettled.").

Many courts have expressly held that there is no requirement that criminal contempt proceedings be brought in the name of the sovereign. For example, the Illinois Supreme Court has held that "[c]riminal contempt proceedings do not have to be brought in the name of the People." *In re Marriage of Rodriguez*, 545 N.E.2d 731, 734 (Ill. 1989). Similarly, the Indiana Supreme Court has determined that, so long as "'[i]t was clear to all, including the Respondent, that this was a criminal contempt proceeding . . . it [was] unnecessary that the State actually be named.'" *In re Crumpacker*, 431 N.E.2d 91, 95 (Ind. 1982). Likewise, the California Supreme Court has concluded that criminal contempt cases "are not . . . required to be brought in the name of the people of the state, nor prosecuted by their authority." *Bridges* v. *Sup. Ct. of Los Angeles County*, 94 P.2d 983, 989 (Cal. 1939),

rev'd on other grounds sub nom, Bridges v. *California*, 314 U.S. 252 (1941). The Pennsylvania Supreme Court has explained that "in most cases of a violation of a court order, the criminal contempt is really initiated or prosecuted by the aggrieved party; the contempt is not prosecuted in the name of the People and the State's Attorney is not even notified or aware of the proceedings." *Commonwealth* v. *Allen*, 486 A.2d 363, 369 (Pa. 1984) (citation omitted), *overruled on other grounds, Commonwealth* v. *Yerby*, 679 A.2d 217, 221 (Pa. 1996); *see also McDougall* v. *Sheridan*, 128 P. 954, 963 (Idaho 1913) ("[I]n a proceeding for contempt, it is not necessary to name the state as plaintiff."); *In re Contempt of Potter*, 301 N.W.2d 560, 561 (Neb. 1981) (affirming contempt conviction over objection that "[t]he prosecution for contempt should have been brought in the name of the State and prosecuted by the county attorney"); *Freeman* v. *Huron*, 66 N.W. 928, 928 (S.D. 1896) ("[T]here is no settled doctrine with reference to the proper method of framing the title to" criminal contempt proceedings), *abrogated on other grounds, Sazama* v. *State ex rel. Muilenberg*, 729 N.W.2d 335 (S.D. 2007); *Manderscheid* v. *District Court of Plymouth Co.*, 28 N.W. 551, 552 (Iowa 1886) ("[I]t was proper to conduct the proceedings for contempt under the titles of the respective equity cases, for it was against the judicial authority exercised in those cases that the alleged acts of contempt were committed."), *aff'd sub nom. Eilenbecker* v. *District Court*, 134 U.S. 31 (1890). *But see State ex rel. Koppers Co.* v. *Int'l Union of Oil,*

Chem. & Atomic Workers, 298 S.E.2d 827, 829 (W. Va. 1982) ("A criminal contempt should be brought in the name of the State.").[12]

The same absence of any settled rule is reflected in this Court's cases, which has heard non-habeas criminal contempt cases titled in at least seven different ways:

- "*Smith* v. *Jones*," (*e.g.*, *Sandefur* v. *Canoe Creek Coal Co.* (consolidated with *Michaelson* v. *United States ex rel. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*), 266 U.S. 42 (1924); *Bessette* v. *W.B. Conkey Co.*, 194 U.S. 324 (1904));

- "*In re Jones*" (*e.g.*, *In re Murchison*, 349 U.S. 133 (1955));

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[12] Although the traditional understanding is that "[i]n its origin, *all* legal contempt will be found to consist in an offense more or less direct against the Sovereign himself as the fountain-head of law and justice," James Francis Oswald, Contempt of Court, Committal, and Attachment, and Arrest Upon Civil Process 1 (2d ed. 1895) (emphasis added), *civil* contempt cases are typically—but not always—brought in the name of the parties to the underlying case. *See, e.g.*, *Gompers*, 221 U.S. at 445 (civil contempts are ordinarily entitled "as a part of the main cause"); *Eddens* v. *Eddens*, 50 S.E.2d 397, 403 n.2 (Va. 1948) ("[C]ivil contempt proceedings are usually prosecuted in the names of the parties."). *But cf. Hansen* v. *Harris*, 28 P.2d 649, 656 (Or. 1933) ("proceedings for a civil contempt should be conducted in the name of the state of Oregon, *ex rel.* the prosecuting party.").

- "*City* v. *Jones*" (*e.g.*, *Eaton* v. *Tulsa*, 415 U.S. 697 (1974));

- "*State (or United States) ex rel. Smith* v. *Jones*" (*e.g.*, *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987); *Michaelson* v. *United States ex rel. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 266 U.S. 42 (1924));

- "*Judge* v. *Jones*" (*e.g.*, *Taylor* v. *Hayes*, 494 S.W.2d 737 (Ky. 1973), *rev'd* 418 U.S. 488 (1974); *Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966); *Ungar* v. *Sarafite*, 376 U.S. 575 (1964));

- "*Court* v. *Jones*" (*e.g.*, *Eilenbecker* v. *District Court*, 134 U.S. 31 (1890)); and

- "State (or United States) v. Jones" (e.g., *Bloom* v. *Illinois*, 391 U.S. 194 (1968); *United States* v. *Barnett*, 376 U.S. 681 (1964)).

In addition to agreeing that there is no settled practice, the authorities agree that whether a criminal proceeding is brought in the name of the sovereign is a "comparatively unimportant matter." Rapalje, *supra*, § 95; *see also*, *e.g.*, *Hughes* v. *Territory*, 85 P. 1058, 1060 (Ariz. 1906) ("[T]he matter of the title of the petition or of the proceedings is unimportant, and not one that affects the jurisdiction of the court."); 13 Cor. Jur., Contempt, § 82, p. 60 (1917) ("[I]t is a matter of no importance who institutes the proceedings for contempt, since the alleged contemner is not

prejudiced in his defense by the particular mode in which the facts are brought to the attention of the court."). Consequently, even if there were a settled common law understanding that criminal contempt proceedings must be bought in the name of the sovereign, it would not be the type of "indispensable component" of the common law that could be implicitly incorporated into the Constitution through the use of generalized terms such as "crimes." *See Williams* v. *Florida*, 399 U.S. at 100. In fact, however, there is not even an established common law requirement—let alone a constitutional requirement—that criminal contempt proceedings be brought in name of the sovereign.

3. This Court's Decisions Do Not Dictate A Different Result

Contrary to Petitioner's contention, the court of appeals' decision in this case is not in conflict with this Court's decisions in *Gompers* and *Dixon*.

a. *Gompers* involved a judgment of contempt for violating an order enjoining a boycott of Buck's Stove & Range Company. 221 U.S. at 435-36. The three defendants were required to testify at the contempt proceeding and were sentenced to a determinate term of imprisonment. *Id.* at 435, 447-48. Petitioner's discussion of *Gompers* proceeds from the faulty premise that the Court "determined that the contempt proceeding at issue was criminal." Pet. Br. 40. To the contrary, the Court held, "this was a proceeding in equity for *civil contempt* where the

only remedial relief possible was a fine payable to the complainant." 221 U.S. at 451 (emphasis added).

In reaching this conclusion, the Court relied in part on the style of the case (*Bucks Stove & Range Co.* v. *Gompers*). The Court noted that "[t]his is not a mere matter of form," because "every citizen, however unlearned in the law, by mere inspection of the papers in contempt proceedings ought to be able to see . . . whether it sought to benefit the complainant or vindicate the court's authority." 221 U.S. at 446. The court expressly stated, however. that "the practice has hitherto been so unsettled" with regard to naming the state "that we do not now treat it as controlling." *Id.* Moreover, while noting that one proper style for a criminal case would have been "*United States* v. *Gompers*," the Court noted that forms such as "*In re Samuel Gompers*" were also appropriate. *Id.* The Court discussed the style of case only as a factor in deciding whether the proceeding was civil or criminal in nature. The Court did not hold that naming the sovereign is required by the Constitution.

Moreover, *Gompers* was decided before the merger of law and equity, and the Court's concern that a criminal sentence could not be entered in a civil proceeding depended on "whether this was a proceeding in equity or at law." 221 U.S. at 441. Ater the merger of law and equity in 1937, the Court had no difficulty sustaining criminal contempt convictions brought in the same proceeding as a civil contempt, stating, "Common sense would recognize that conduct can amount to both civil and criminal

contempt. . . . Disposing of both aspects of the contempt in a single proceeding would seem at least a convenient practice." *United States* v. *United Mine Workers of America*, 330 U.S. 258, 299 (1947). "[A] mingling of civil and criminal contempt proceedings must . . . be shown to result in substantial prejudice before a reversal will be required. *Id.* at 299-300. "That the contempt proceeding carried the number and name of the equity suit does not alter this conclusion." *Id.* at 300.

Contrary to Petitioner's assertion (Pet. Br. 41), this case is not "indistinguishable from *Gompers*." Unlike *Gompers*, it was clear from Respondent's initial motion—entitled "Motion to Adjudicate Criminal Contempt"—that this was a criminal contempt proceeding. J.A. 59-60. Unlike the defendants in *Gompers*, Petitioner was not made a witness to the proceeding, nor was he required to testify. *Cf.* 221 U.S. at 447-48. Because this case was clearly a criminal contempt proceeding from beginning to end, the Court's decision in *Gompers* to set aside criminal sentences imposed in a civil proceeding does not establish that Petitioner's sentence should be set aside here.[13]

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[13] In *Hicks* v. *Feicck*, which concerned a contempt proceeding for failure to comply with a child support order, the Court concluded that the nature of the relief imposed is "dispositive" of whether the contempt is civil or criminal. 485 U.S. 624, 637 (1988). The Court did not consider it relevant that the case was (continued...)

b. Petitioner also misconstrues this Court's decision in *Dixon* v. *United States*. In *Dixon*, the Court held that a criminal contempt conviction could pose a Double Jeopardy bar to a subsequent criminal prosecution based on the same incident. 509 U.S. 688, 696 (1993). *Dixon* was consolidated with another case, *Foster* v. *United States*, which involved a criminal prosecution that occurred subsequent to a criminal contempt conviction under the D.C. Code § 16-1005(f), the statutory provision at issue in this case. *See id.* at 692.

Petitioner asserts that two aspects of the *Foster* case require a finding that the United States was the "true party" that prosecuted his contempt action. *First*, Petitioner contends that "Mr. Foster's case could not have been correctly decided if . . . D.C. Code § 16-1005(f) authorizes a private right of action" because "'[t]he protections of the Double Jeopardy Clause are not triggered by litigation between private parties,'" Pet. Br. 44 (quoting *United States* v. *Halper*, 490 U.S. 435, 451 (1989)). *Second*, Petitioner asserts that this Court effectively held that the United States was the true party in interest because "the United States and Michael Foster were the only parties to" the *Foster* case in this Court. Pet. Br. 45. Petitioner is incorrect on both points.

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brought by the district attorney "acting on behalf of" a private party. *Id.* at 624.

Petitioner's reliance on *Halper* is misplaced. When read in context, the language quoted by Petitioner is clearly referring to *civil* suits between private litigants. 490 U.S. at 450 ("Nothing in today's opinion precludes a private party from filing a *civil suit* seeking damages for conduct that previously was the subject of criminal prosecution and punishment.") (emphasis added). The Court discussed civil suits between private litigants to distinguish those suits from the civil suit brought by the government, which triggered the Double Jeopardy Clause. *Id.* This distinction was rendered meaningless by the subsequent overruling of *Halper*. *See Hudson* v. *United States*, 522 U.S. 93, 100 (1997) (overruling *Halper*, 490 U.S. at 435).

Second, it is not surprising that "the United States and Michael Foster were the only parties" to the *Foster* case (Pet. Br. 45), because it was the subsequent criminal case against Mr. Foster—not the earlier criminal contempt case—that was decided by this Court. *See* 509 U.S. at 693-94. The criminal case was brought and litigated in the name of the United States at all levels. *See Foster* v. *United States* (consolidated with *United States* v. *Dixon*), 598 A.2d 724, 727-28 (D.C. 1991) ("[T]he United States Attorney's Office filed a complaint charging Foster with a single count of assault with intent to kill while armed."). The earlier contempt proceeding, in contrast, was initiated by Mr. Foster's wife, Ana Foster, who "filed three separate motions to have her husband held in contempt for numerous violations of the CPO." 509 U.S. at 692. This Court did not hold

that the United States was the "true party" to the criminal contempt proceeding. Instead, the Court stated that "Ana Foster and her mother prosecuted the action," and that "the United States was not represented at trial." *Id.*

Dixon's application of the Double Jeopardy Clause does not establish that a contempt prosecution under D.C. Code § 16-1005(f) must be prosecuted in the name of the United States. This Court has recognized that the Double Jeopardy Clause can apply even "where successive cases are brought by *nominally different prosecuting entities*." *United States* v. *Wheeler*, 435 U.S. 313, 318 (1978) (emphasis added). Nor is there any reason to think that, notwithstanding *Wheeler*, the Supreme Court assumed that the United States was a party to Foster's contempt proceeding. The lower court decision in *Dixon* expressly stated that "[t]he United States was not a party" to the contempt proceeding. *United States* v. *Dixon*, 598 A.2d 724, 726 (D.C. 1991) (en banc). The court of appeals held that the Double Jeopardy Clause applied—even though the United States was not a party—because "the identity of the prosecuting party in the contempt proceeding is irrelevant to the double jeopardy issue." *Id.* at 732.[14]

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[14] In *United States* v. *Providence Journal Co.*, 485 U.S. 693 (1988), the Court concluded that a criminal contempt prosecution was "a suit 'in which the United States is interested,' within the meaning of [28 U.S.C.] § 518(a), (continued...)

C. Private Prosecutions Were Well Established At The Time Of The Founding.

Petitioner devotes a large portion of his brief to arguing that the common-law definition of a crime is a "public wrong," and that the Constitution requires that all criminal proceedings be brought in the name of the sovereign. Pet. Br. 14-35. As explained above, this argument is beside the point. There was (and is) no settled common law understanding that criminal contempts must be brought in the name of the sovereign. And even if there were such a requirement, it would not have been incorporated into the Constitution by the word "crimes." We nevertheless briefly address Petitioner's description of criminal prosecutions at the time of the Founding because it is both incomplete and misleading.

1. In England and in America at the time of the Founding, prosecutions by victims of crime and

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regardless of who is appointed by the district court to prosecute the action." *Id.* at 707-708. Unlike *Providence Journal*, in which "the action was initiated in vindication of the 'judicial Power of the United States,'" *id.* at 700 (quoting U.S. Const., art. III), this case arose in the District of Columbia Superior Court, which is part of "a wholly separate court system designed primarily to concern itself with local law and to serve as a local court system for a large metropolitan area." *Palmore* v. *United States*, 411 U.S. 389, 408 (1973).

their families were the rule, not the exception. As Petitioner conceded in the court below, even outside the contempt context, "there is a long tradition in our legal system of private person serving as prosecutors to criminal actions." C.A. Post-Argument Br. at 4. *See id.* at 4-5 ("[T]hroughout much of the common law's history, private person served as the prosecutors to virtually all criminal actions."; "[T]he public prosecutor system . . . is a fairly new phenomenon in the common law legal tradition."; "[T]he common law did not frown on the practice of having aggrieved persons serve as private prosecutors."; "Quite the contrary, having the putative victim of a crime (or his or her representative) serve as the prosecuting attorney was the norm.")

In his brief to this Court, Petitioner barely acknowledges this history. Instead, he argues that the only common law analogue to the criminal contempt proceeding in this case is the "appeal of felony," which Petitioner describes as a "private action[ ] grounded in notions of personal vengeance, historically settled through the decidedly personal and vengeful mechanism of 'trial by battle.'" Pet. Br. 21. *see also Hurtado* v. *California*, 110 U.S. 516, 526 (1884) (discussing appeal of murder). In fact, the criminal contempt prosecution in this case was closely analogous to ordinary criminal prosecutions at the time of the Founding. *See Steele Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 127-28 (1998) (Stevens, J., concurring) ("[I]n England, in the American Colonies, and in the United States,

private persons regularly prosecuted criminal cases."); *United States* v. *Marion*, 404 U.S. 307, 329 n.2 (1971) (Douglas, J., concurring), citing and quoting 1 J. Stephen, *History of the Criminal Law of England* 493 (1883).

In England, private citizens initiated and conducted most criminal prosecutions, *See* 4 *Commentaries* at *303; Douglas Hay, *Controlling the English Prosecutor*, 21 Osgoode L.J. 165, 168-70 (1983). Because the right of a private individual to bring an indictment was regarded as a protection against potential Executive abuse of the criminal process, "[i]t was almost inconceivable that the Attorney-General should act as the protector of the ordinary citizen from oppressive prosecution." *Id.* at 171. In the 19th century, Parliament twice rejected proposals to establish a system of public prosecutors. *See id.* at 174. When it finally created a public prosecutors' office in 1879, Parliament carefully preserved the rights of private prosecutors. *See* Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 Harv. J. L. & Pub. Pol'y 357, 361-62 (1986).

Private prosecutions were also common in America at the time of the Founding. *See* Angela J. Davis, *Arbitrary Justice: The Power of the American Prosecutor* 9 (2007); Allen Steinberg, *The Transformation of Criminal Justice: Philadelphia, 1800-1850* 1-2 (1989). By 1900, courts of last resort in 15 states had affirmatively sanctioned privately funded prosecutions. Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-*

Century United States, 39 Am. J. Legal Hist. 43, 49 (1995).

As Petitioner acknowledged in the court of appeals, a number of States "still have vibrant practices of private prosecutions of less serious statutory and general common law criminal offenses." Pet. C.A. Post-Argument Br. at 10 n.6. In New York, for example, "it has long been common practice for the complainant to conduct the prosecution in certain cases, generally involving violations." *People ex rel. Allen* v. *Citadel Mgmt. Co.*, 355 N.Y.S.2d 976, 978 (N.Y.C. Crim. Ct. 1974). In Pennsylvania, private criminal complaints act as a "check on the office where the district attorney has overlooked a matter or is not diligently pursuing a matter." *In re Hickson*, 765 A.2d 372, 380 (Pa. Super. 2000) (holding that only interested prosecutors have standing to bring a private criminal complaint), *aff'd*, 821 A.2d 1238. Other states likewise allow private criminal prosecutions under certain circumstances.[15]

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[15] *See, e.g.*, *State* v. *Martineau*, 808 A.2d 51, 53 (N.H. 2002) ("[P]rivate prosecutions continue to exist as a matter of New Hampshire common law" for petty offenses not involving jail time.); *Olsen* v. *Koppy*, 593 N.W.2d 762, 767 (N.D. 1999) (where the state attorney is neglectful, the trial court has discretion "to appoint a private attorney in criminal proceedings"); *State* v. *Storm*, 661 A.2d 790 (N.J. 1995) (allowing private prosecutions by disinterested parties); *Katz* v. *Commonwealth*, 399 N.E.2d 1055, 1060 (Mass. 1979) (noting in landlord-tenant contempt (continued...)

This history shows that the criminal contempt prosection in this case does not inhabit "an alternative universe" of "prosecutions of a type never contemplated by the Framers." Pet. Br. at 15. To the contrary, Respondent's role in the proceeding would have been entirely familiar to, and accepted by, the Framers.

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case that "[p]rivate parties to civil litigation have the right 'to press both the civil and criminal aspects of the case'"; "a private citizen may prosecute a purely criminal complaint in the Housing Court, as in a District Court."); *Tonkin* v. *Michael*, 349 F.Supp. 78, 82 (D.V.I. 1972) (court may appoint private prosecutor where the Attorney General fails to appear to prosecute a complaint). Even where purely private prosecutions are not available, many states allow a substantial role for private prosecutors in criminal proceedings. *See, e.g.*, *Veteto* v. *State*, 8 S.W.3d 805, 817 (Tex. Ct. App. 2000) (district court did not abuse discretion in permitting counsel retained by the victim's family, to present the prosecution's opening statement and examine half of the witnesses), *overruled on other grounds*, *State* v. *Cook*, 248 S.W.3d 172 (Tex. Crim. App. 2008); *State* v. *Crouch*, 445 S.E.2d 213, 219 (W. Va. 1994) (where public prosecutor did not attend a hearing, a private prosecutor retained by the victim's family could conduct the hearing "in order to ensure that the case would be prosecuted vigorously"); *State* v. *Addis*, 186 S.E.2d 415, 417 (S.C. 1972) ("If [a private prosecutor] participates in the trial of a case and does only what a solicitor should do, the defendant has no right to complain.").

D. This Case Does Not Turn On Whether Criminal Contempt Prosecutions Must Be Brought "Pursuant To The Power Of" The United States.

Although Petitioner framed the question presented to include the abstract issue of whether a contempt prosecution must be brought "pursuant to the power of the United States," that issue was not raised or decided in the courts below. Because the issue has not been litigated, it is not clear what Petitioner means by the phrase "pursuant to the power of the United States." In one sense, the contempt proceeding undoubtedly was conducted pursuant to the power of the United States. Ms. Watson was authorized to initiate the proceeding by a District of Columbia statute and court rules; the case was adjudicated by the District's courts; and Congress established the D.C. Council and courts. But if Petitioner refers to "power" only in this sense, then the term is meaningless because every proceeding in federal court is brought pursuant to the power of the United States. In another sense, the contempt proceeding was not conducted "pursuant to the power of the United States," because District of Columbia law authorized Respondent to initiate the proceeding on her own.

Ultimately, the question whether the criminal contempt proceeding was brought "pursuant to the power of the United States" is relevant only if it establishes Petitioner's underlying claim that Ms. Watson was the "government" as that term was used

in the plea agreement. Because Ms. Watson cannot be considered the "government" under any reasonable interpretation of the plea agreement, this case does not turn on whether Ms. Watson was acting "pursuant to the power of the United States."

1. The Court Should Not Reach The Issue Of Whether Respondent Exercised The "Power" Of The United States.

"Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Penn. Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 213 (1998) (internal quotation marks and citations omitted). The question whether the contempt proceeding was "pursuant to the power of the United States" was not raised or decided below, and therefore should not be considered here.

The question before the court of appeals was whether Robertson's plea agreement barred his contempt prosecution because it promised that the "gov't" would not pursue charges. Pet. App. A.xi, xviii. The court first held that "a criminal contempt proceeding is properly brought in the name of a private person, here Ms. Watson, rather than in the name of the sovereign." *Id.* at xv. The court then applied principles of contract law to conclude that "[t]he abbreviated word 'gov't' clearly referred to the United States, not Ms. Watson, and certainly not the District of Columbia . . .". *Id.* at xviii. Because the contempt was brought in the name of Ms. Watson, "no objectively reasonable person could understand that Mr. Robertson's plea agreement bound Ms.

Watson and precluded her contempt proceeding against Mr. Robertson." *Id.* at xix.

The court of appeals did not consider whether Robertson's contempt proceeding was conducted pursuant to the "power" of Ms. Watson or the United States. Indeed, the term "power" appears nowhere in the court of appeals' decision. The court of appeals did not address the "power" issue because Robertson argued only that the proceeding was "in the name" of the United States. *See id.* at ix-x (Robertson contended that "the action against him 'was maintained in the name of the relevant sovereign, . . . the United States'; and that 'there is no such thing in our legal system as a criminal action maintained 'in the name of a private person.'"); *id.* at xiv (Robertson "asserts that such an action could only be brought 'in the name of the relevant sovereign, . . . the United States."); *id.* at xviii ("Mr. Robertson starts from the faulty assumption that the criminal proceeding against him was brought in the name of the United States.").

2. The Plea Agreement Did Not Bar The Contempt Proceeding Regardless Of Whose Power Was Exercised.

Even if the Court considers the "power" issue, it must do so in the context of the claim for relief presented by Robertson. Whether a criminal contempt proceeding is brought "pursuant to the power of the United States" is relevant only if it establishes that the plea agreement barred the contempt prosecution. *See Black* v. *Cutter Labs.*, 351

U.S. 292, 297 (1956) ("This Court . . . reviews judgments, not statements in opinions").[16] If a private party can exercise government power without becoming the "gov't," as that term is used in the plea agreement, then the court of appeals correctly decided Robertson's claim.

a. This Court's cases involving private prisons demonstrate that Ms. Watson would not become the "government" even if she were prosecuting Robertson pursuant to the power of the United States. Maintaining a prison is unquestionably an important government function. Indeed, this Court has explained that "[o]ne of the primary functions of government . . . is the preservation of societal order through enforcement of the criminal law, *and the maintenance of penal institutions is an essential part of that task*." *Yeskey*, 524 U.S. at 209 (internal quotation marks and citations omitted) (emphasis added).

Although maintaining a prison may qualify as "state action"—and therefore require the private prison company and its employees to comply with any constitutional provisions that are applicable to the State—the Court's decisions demonstrate that the private entities remain distinct from the

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[16] Here, to the extent the Court considers whether the contempt prosecution was brought "pursuant to the power of the United States," it will be reviewing a statement that does *not* appear in the lower court's opinion.

"government." In *Richardson* v. *McKnight*, 521 U.S. 399, 412 (1997), this Court held that private prison guards, unlike government prison guards, are not entitled to qualified immunity under 42 U.S.C. § 1983.[17] The Court distinguished between private and public prison guards—even though they perform identical functions—because the policy reasons for granting qualified immunity to government employees do not apply to employees for private for-profit corporations. *Richardson*, 521 U.S. at 407-12. The Court explained that the private prison guards "resemble [employees] of other private firms and *differ from government employees*." *Id.* at 410 (emphasis added); *cf. Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 66 (2001) (prisoner has a *Bivens* action against government prison guards, but not against corporation running a private prison).

b. Even if Ms. Watson were exercising the "power of the United States," the plea agreement cannot reasonably be interpreted to prevent her from initiating a contempt proceeding. As the court of appeals explained, the term "gov't" must be given a reasonable interpretation based on the language of the plea agreement. Pet. App. A.xviii. The agreement cannot be reasonably interpreted to include every entity—both public and private—that

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[17] The Court assumed without deciding that the prison guards acted "under color of state law" and therefore were subject to suit under § 1983. *Richardson*, 521 U.S. at 413.

acts "pursuant to the power of the United States" within the meaning of "gov't."

The text of the agreement demonstrates that the term "gov't" was intended to have a narrow meaning. The names of the District of Columbia and the Assistant Corporation Counsel are crossed out, *id.*, which establishes that "gov't" was not intended to include the entire government, or even all public prosecutors. Because the D.C. Attorney General's Office prosecutes crimes "pursuant to the power of the United States" (in the sense that it derives its authority from Congress), the agreement cannot be reasonably interpreted to include all entities exercising the prosecutorial power of the United States.

When the term "gov't" is interpreted in light of the entire agreement, it is clear that it refers only to the U.S. Attorney's Office for the District of Columbia. The agreement states that the "gov't" agrees to: (i) "dismiss the charges"; (ii) "not pursue any charges concerning an incident on 6-26-99"; and (iii) "reserve[] step-back and allocution." J.A. 28-29. Only the U.S. Attorney's Office for the District of Columbia, not the entire "gov't," had the authority to carry out parts (i) and (iii) of the agreement. Because "gov't" referred to the U.S. Attorney's Office for two of the three items, it should be given the same limited meaning with respect to the agreement not to pursue charges.

Moreover, an objectively reasonable defendant would not interpret the plea agreement to prevent a

contempt proceeding because he would be aware that the U.S. Attorney could not agree that such charges would not be pursued. The D.C. Code provides that "'[t]he institution of criminal charges by the United States Attorney shall . . . not affect the rights of the [CPO] complainant to seek any other relief under this subchapter,'" and the relief available under "this subchapter" includes "a contempt adjudication under § 16-1005(f)." Pet. App. A.xix. Moreover, the D.C. Attorney General is authorized to pursue a contempt proceeding on behalf of the individual. D.C. Super Ct. Intrafamily R. 9(a)(2); D.C. Code § 16-1003(c) (1989 repl.); *see* D.C. Code § 16-1003(b) (2009 supp.). It is unreasonable to interpret the plea agreement in a way that contravenes a statute.

Finally, federal courts of appeals often are required to determine the meaning of "government" in a plea agreement, and these cases do not hold that every entity, including private parties, are the "government" if they act pursuant to the power of the Unites States. To the contrary, courts frequently adopt narrow interpretations that do not bind even the entire federal government. *See, e.g., United States* v. *Camacho-Bordes*, 94 F.3d 1168, 1175 (8th Cir. 1996) (INS not bound by plea agreement made on behalf of "the government" by the U.S. Attorney). Other courts would narrowly interpret the plea agreement at issue here because, by striking District of Columbia, the agreement was intended to apply only to the U.S. Attorney's Office for the District of Columbia. *See, e.g., United States* v. *Gebbie*, 294 F.3d 540, 550 (3d Cir. 2002).

In short, whether or not Ms. Watson was acting "pursuant to the power of the United States," she was not "the government" for purposes of Petitioner's plea agreement.

II. The District of Columbia Law Regulates Contempt Proceedings In A Constitutionally Permissible Manner.

Petitioner contends that the District of Columbia law violates constitutional separation-of-powers principles because it divests the Executive Branch of control over criminal contempt proceedings. Pet. Br. 54-56. Similarly, Petitioner contends that the law violates the Due Process Clause because it deprives him of the "right to be prosecuted by the government." *Id.* at 56-58. These constitutional issues were not properly presented to the courts below, and therefore they should not be considered by this Court. In any event, Petitioner's constitutional arguments lack merit. The District of Columbia law *cannot* violate constitutional separation-of-powers principles because those principles do not apply to the District. Moreover, even if constitutional separation-of-powers principles applied, the District of Columbia law would not violate them. Petitioner's due process argument is similarly flawed. Contrary to Petitioner's assertion,

the Due Process Clause does not provide a right to be prosecuted by the government.[18]

A. The District of Columbia Law Does Not Violate Constitutional Separation-of-Powers Principles.

Petitioner contends that the decision to prosecute is a core executive power, and therefore "divest[ing] the Executive of its constitutional function in this matter disrupts the constitutional allocation of power among the three branches of government." Pet. Br. 55-56. This argument fails for

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[18] Petitioner frames the arguments in terms of the "doctrine of necessity" and the "principle of restraint" (Pet Br. 46-58), but those principles relate to a court's inherent contempt power. *See, e.g., Young*, 481 U.S. at 801. This Court has never suggested that a legislature's power to regulate contempt proceedings is limited by those principles. Moreover, Petitioner's "doctrine of necessity" and "principle of restraint" framework adds nothing to the constitutional analysis. According to Petitioner, the "doctrine of necessity" and "principle of restraint" are designed to minimize the contempt power's intrusion on separation-of-powers and due process principles. Pet. Br. 46-50. Absent a constitutional violation, these principles do not come into play. Thus, Petitioner's "doctrine of necessity" and "principle of restraint" arguments necessarily fail for the same reasons that his separation-of-powers and due process arguments fail—including because they were not raised below.

two reasons. *First*, the law cannot violate constitutional separation-of-powers principles because those principles do not apply to the District of Columbia. *Second*, even if constitutional separation-of-powers principles applied, the District of Columbia law does not violate them.

1. The separation-of-powers principles governing the relationship between the different branches of the federal government arise from the structure of the Constitution. *See INS* v. *Chadha*, 462 U.S. 919, 946 (1983) ("The very structure of the articles delegating and separating powers under Arts. I, II, and III exemplify the concept of separation of powers."). Because the first three Articles of the U.S. Constitution divide power only among the branches of the federal government, the separation-of-powers principles inherent in the structure of the Constitution apply only to the federal government.

Nothing about the structure of the Constitution suggests that the Framers intended to impose separation-of-power principles on the District of Columbia.[19] With respect to the District of

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[19] Likewise, it is well-settled that the separation-of-powers principles found in the federal Constitution do not apply to the States. *See Mayor of Philadelphia* v. *Educ. Equality League*, 415 U.S. 605, 615 n.13 (1974) ("The Constitution does not impose on the States any particular plan for the distribution of governmental powers."); *Dreyer* v. *Illinois*, 187 U.S. 71, 84 (1902) ("Whether the legislative, executive and judicial powers (continued...)

Columbia, the Constitution grants no powers to the executive and judicial branches. In contrast, Congress is granted the power to "exercise exclusive Legislation in all Cases whatsoever" for the District of Columbia. U.S. Const. art. I, § 8, cl. 17.

This Court has long recognized that "Congress has the entire control over the [District of Columbia] for every purpose of government." *Kendall* v. *United States ex rel. Stokes*, 37 U.S. 524, 698 (1838). Congress's powers over the District of Columbia therefore "are obviously different in kind from the other broad powers conferred on Congress: Congress's power over the District of Columbia encompasses the *full* authority of government, and thus, necessarily, the Executive and Judicial powers as well as the Legislative." *N. Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 75-76 (1982) (plurality) (emphasis in original); *see also Palmore* v. *United States*, 411 U.S. 389, 397-98 (1973) ("It is apparent that the power of Congress under Clause 17 permits it to legislate for the District in a manner with respect to subjects that would exceed its powers, or at least would be very unusual, in the context of national legislation enacted under other powers delegated to it under Art. I, § 8.").

The District of Columbia's history illustrates the absence of any constitutional separation-of-

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of a State shall be kept altogether distinct and separate . . . is for the determination of the State.").

powers requirement. For nearly a century (from 1874 to 1973), the District was governed by a three-member commission that exercised both legislative and executive powers. The commissioners, who were appointed by the President, were "at one and the same time city mayor, city treasurer, board of alderman, and common council, subject only to the Congress. They [were] executives administering the various laws of Congress; [and] legislatives promulgating and enacting ordinances of every conceivable kind and character." District of Columbia Appropriation Bill, Hr'g Before the House Comm. on Appropriations, (Jan. 5, 1916); *see generally* Staff of the House Committee on the District of Columbia, 101st Cong., 2d Sess., Governance of the Nation's Capital: A Summary of the Forms and Powers of Local Government for the District of Columbia, 1790 to 1973, at 39-40 (Comm. Print 1990).[20]

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[20] Petitioner addresses the issue of whether constitutional separation-of-powers apply to the District of Columbia only in a footnote. Pet. Br. 55 n.23. Neither Petitioner nor the cases he cites suggest that The Constitution imposes separation-of-powers principles on the District of Columbia. The fact that Congress has implemented a form of separation of powers principles for the current District of Columbia government, District of Columbia Home Rule Act, Pub. L. No. 93-198, 87 Stat. 774 (Dec. 24, 1973), does not suggest that these principles are constitutionally mandated. In any event, the Home Rule Act's incorporation of separation-of-powers principles is irrelevant to this case. Petitioner has never challenged the (continued...)

2. Even if constitutional separation-of-powers principles applied, they would not invalidate the District of Columbia law. Petitioner bases his separation-of-powers argument on this Court's characterization of the prosecutorial power as a "core executive constitutional function," Pet Br. 54 (quoting *United States* v. *Armstrong*, 517 U.S. 456, 465 (1996)), and on his view that the Executive Branch has "*exclusive* authority and *absolute* discretion to decide whether and how to prosecute a case," Pet. Br. 48 (emphasis added). Neither factor suggests that separation-of-powers principles prohibit a private party from prosecuting contempt in his or her own name.[21]

District of Columbia law on the ground that its enactment exceeded the D.C. Council's authority under the Home Rule Act. Nor is the scope of the D.C. Council's legislative authority fairly included in the question before the Court, which is limited to whether the *Constitution*, not an Act of Congress, prevents a contempt prosecution in the name and power of a private person.

[21] Petitioner also contends that a criminal contempt action titled in the name of a private party violates the President's Pardon Power by defining a crime that is not "'an offense against the United States.'" Pet Br. 55 n.22. But this Court has already held that the pardon power extends to criminal contempts involving Article III courts. *Ex Parte Grossman*, 267 U.S. 87, 112-13 (1925). In *Grossman*, the Court held that "the words 'for offences against the United States' were inserted by a Committee on Style, presumably to make clear that the pardon of the President was to operate upon offenses against the (continued...)

Petitioner's position is flatly contradicted by *Young*. In *Young*, the Court expressly rejected the argument that "any prosecution of contempt must . . . be considered an execution of the law in which only the Executive Branch may engage." 481 U.S. at 799-800. A court's power to appoint a private contempt prosecutor cannot be "wielded to eradicate fundamental separation-of-powers boundaries" because the court's power reached only the people who have come before it, and not the "entire population." *Id.* at 800 n.10. If divesting the executive of the power to initiate all types of contempt proceedings does not violate separation-of-powers principles, then the power at issue here—which applies only to contempt proceedings arising from violations of Civil Protection Orders—also does not "eradicate fundamental separation-of-powers boundaries." *Id.*

Even outside the contempt context, the Executive Branch does not have exclusive authority

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United States as distinguished from offenses against the States." *Id.* at 113. "That which violates the dignity and authority of federal courts . . . violates a law of the United States, and so must be an offense against the United States." *Id.* at 115 (citation omitted). The same principle can be extended to acts that violate the dignity and authority of courts of the District of Columbia, which were created by Congress. It does not follow, however, that criminal prosecutions may not be brought in the name of the District of Columbia or a private person.

and absolute discretion in deciding whether and how to prosecute. The Grand Jury Clause deprives the executive of absolute discretion to prosecute a case. *See, e.g.*, *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962) ("Historically, [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution"); *Davis* v. *United States*, 411 U.S. 233, 253 (1973) (Marshall, J., dissenting) ("When it fulfills its proper function, the grand jury is a central institution of our democracy, restraining the discretion of prosecutors to institute criminal proceedings.").

Congress also places limitations on the Executive Branch's discretion to decide whether to prosecute. For some offenses, Congress has dictated that particular officials within the Executive Branch should decide whether to prosecute a case. *See, e.g.*, 18 U.S.C. § 1119(c)(1) (2006) ("No prosecution may be instituted against any person under this section except upon the written approval of the Attorney General, the Deputy Attorney General, or an Assistant Attorney General, which function of approving prosecutions may not be delegated."). Congress has even prescribed rules for how the decision should be made: "No prosecution shall be approved under this section unless the Attorney General, in consultation with the Secretary of State, determines that the conduct took place in a country in which the person is no longer present, and the country lacks the ability to lawfully secure the person's return." *Id.* § 1119(c)(2); *see also id.* § 2332(d).

Nor does the Executive Branch have exclusive authority and absolute discretion to decide how a case is prosecuted. Rules of evidence and procedure, adopted and enforced by Congress and the courts, constrain a prosecutor's discretion. This discretion is also limited by rules requiring the government to produce documents, statements, and other evidence to the defense. *See, e.g.*, *Brady* v. *Maryland*, 373 U.S. 83 (1963); *Jencks* v. *United States*, 353 U.S. 657 (1957); *see also Palermo* v. *United States*, 360 U.S. 343, 345 (1959) (recognizing both Congress's right to enact rules for criminal trials and the Court's "power, in the absence of statutory provision, to prescribe procedures for the administration of justice in the federal courts").[22]

B. The District of Columbia Law Does Not Violate The Due Process Clause.

1. For the reasons explained in Part I of this brief, there is no due process requirement that a criminal contempt proceeding be brought "in the

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[22] Petitioner (at 48) relies on *Confiscation Cases*, 74 U.S. 454 (1868), to support his assertion that the Executive Branch's discretion is absolute. Those cases refute his position. In *Confiscation Cases*, the Court expressly recognized Congress's ability to limit a prosecutor's discretion: "Public prosecutions, until they come before the court to which they are returnable, are within the exclusive direction of the district attorney, . . . *except in cases where it is otherwise provided in some act of Congress.*" *Id.* at 457 (emphasis added).

name of' the government. Petitioner received notice of the criminal nature of the proceeding and the nature of the charges, and was afforded numerous procedural rights, including a right to counsel, a right not to incriminate himself, a right to present evidence, and a right not to be convicted except upon proof beyond a reasonable doubt.

In this Court, petitioner asserts a due process "right to be prosecuted by the government. " Pet. Br. 58. The Due Process Clause provides such a right, according to Petitioner, because "prosecutorial discretion, in the hands of a public prosecutor, serves the critical function of filtering out insubstantial legal claims." *Id.* Moreover, public prosecutors "are publicly accountable" and "serve the cause of justice." *Id.* (internal quotation marks and citations omitted).

In the proceedings below, Petitioner did not challenge Ms. Watson's participation in the contempt proceeding. Instead, he argued only that the contempt proceeding was properly brought in the name of the United States, and therefore was barred by his plea agreement. *See* Pet. App. A.ix-x (Petitioner contended that "the action against him 'was maintained in the name of the relevant sovereign, . . . the United States'"). Similarly, the question presented in this Court does not ask whether private contempt prosecutions are constitutional, but only whether they can proceed in the name and power of the individual, as opposed to the name and power of the government. Pet. Br. A.i. Because Petitioner's alleged due process right to a prosecution by the government was neither

presented to nor decided by the lower courts, and because it is not fairly included in the question presented, the Court should not reach the issue. *See, e.g., Yee* v. *City of Escondido*, 503 U.S. 519, 537 (1992).

In any event, Petitioner has no Due Process right to a public prosecutor. This Court has never held that the fundamental rights of the accused in criminal contempt cases include a "right to be prosecuted by the government." Pet. Br. 58. To the contrary, in *Young*, the Court held that "it is long settled that courts possess inherent authority to initiate contempt proceedings for disobedience to their orders." 481 U.S. at 793. The courts' inherent authority "necessarily encompasses the ability to appoint a private attorney to prosecute the contempt." *Id.*[23]

Petitioner's assertion (at 59) that his contempt proceeding was "in no sense" controlled by the government is incorrect. Respondent was represented by the D.C. Attorney General. In addition, the trial court exercised substantial control over the proceeding. Rather than authorizing private individuals to file formal criminal charges, D.C. law authorizes them to file "a motion for

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[23] The asserted "right to be prosecuted by the government" is also contrary to the many state court decisions permitting private prosecutions. *See* pages 39-42 & n.15 *supra* (citing and discussing cases).

contempt and proceeding through counsel, or pro se, with a contempt hearing in the Family Division." *Green*, 642 A.2d at 1278 (citing D.C. Sup. Ct. Intrafamily R. 7(c) & 12). Given that the court could initiate a criminal contempt proceeding on its own motion, there can be no constitutional objection to allowing a private party to file a motion requesting that the court initiate contempt proceedings and bringing to the court's attention alleged violations of its order. The court also retains discretionary control over many aspects of the criminal contempt proceeding, including: (i) whether to grant the motion to issue a show-cause order (ii) selection of the issues to be tried and the evidence to be considered; (iv) whether a conviction is warranted (because violation of a CPO is a petty offense tried to the court rather than a jury), and (v) the appropriate punishment (subject to statutory limits). Thus, many decisions that are made by a prosecutor in a typical criminal case are subject to substantial judicial oversight and control in criminal contempt proceedings for violations of a CPO.

Moreover, this Court has never held that a contempt prosecution must be "controlled by[] the Executive Branch or the government." Pet. Br. 59. To the contrary, in *Young*, the Court rejected the view that a criminal contempt proceeding is "execution of the criminal law in which only the Executive Branch may engage." 481 U.S. at 800 (citation omitted). To give a public prosecutor the right to overrule a court's decision to initiate contempt proceedings would vitiate *Young*, which

contemplated that the Court could appoint a private prosecutor even if the public prosecutor declined or even opposed the prosecution. 481 U.S. at 801 (court may appoint a private prosecutor if a "request [to] the appropriate prosecuting authority to prosecute contempt actions . . . is denied."). Such a result would also undermine the court's independence, because the contempt power is "a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law." *Gompers*, 221 U.S. at 450.

2. Petitioner does not contend that the Due Process Clause requires that a private prosecutor in a contempt proceeding be disinterested. To the contrary, he expressly "declined to raise . . . the question . . . whether the Due Process Clause prohibits a private, interested party from prosecuting a criminal contempt action on behalf of the sovereign." Pet. Supp. Cert. Br. 10. In the lower courts, Petitioner did not simply "decline[] to raise the issue", *id.*, he vehemently disavowed it. *See, e.g.*, Pet. C.A. Post-Argument Br. 3 n.3 (The assertion that "Robertson is asking this Court to hold that there is a constitutional right to a disinterested prosecutor for contempt . . . is just wrong."). Accordingly, the Court should not consider this question.

Moreover, the characteristics of criminal contempt under D.C.'s civil protection order system do not implicate the concerns about prosecutions by interested parties articulated by this Court in *Young*.

Contempts are petty offenses punishable by a maximum of 180 days incarceration and a $1,000 fine. D.C. Code Ann. § 16-1005(f), Pet. Br. App. 10. Respondents nevertheless receive substantial constitutional protections, including notice of the charges and the criminal nature of the proceeding, the right to counsel, the opportunity to present evidence, and protection against compelled self-incrimination. *See* D.C. Intrafamily R. 13(e). In addition, a private party prosecuting such a contempt does not wield "expansive powers" nor exercise a "wide-ranging discretion." *Young*, 481 U.S. at 813-14. The contempt proceeding is largely in the hands of the court, and thus does not present "a myriad of occasions for the exercise of discretion." *Id.* at 812-13. And while the domestic violence victim has an interest in obtaining a conviction, any danger of a vindictive prosecution is counterbalanced by the court's control over the proceedings. In addition, unlike a public prosecutor, a private party likely is not protected by absolute or even qualified immunity for her actions. *Cf. Richardson*, 521 U.S. at 412 (private prison guards not entitled to qualified immunity).

CONCLUSION

The judgment of the court of appeals should be affirmed.

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March 2010

REPLY BRIEF

No. 08-6261

In The

Supreme Court of the United States

JOHN ROBERTSON,

Petitioner,

v.

UNITED STATES *ex rel.* WYKENNA WATSON,

Respondent.

On Writ of Certiorari to the District of Columbia Court of Appeals

REPLY BRIEF

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SUMMARY OF ARGUMENT

The Constitution forbids prosecution of a criminal contempt in a purely private right of action where a private person, representing her own interests, decides whether and what charges to prosecute independent of any discretion exercised by a United States prosecutor or a District of Columbia judge. The United States as amicus curiae now agrees that the Constitution presupposes that all criminal prosecutions in congressionally created courts, including prosecutions for criminal contempt, are exercises of sovereign power to punish for the commission of public wrongs. Respondent contends that a purely private right of action is constitutional but fails to rebut Petitioner's arguments that under our Constitution a crime is a public wrong, criminal contempt actions are between the public and the defendant, and deviations from traditional constitutional protections in criminal contempt actions can be justified solely by the doctrine of necessity.

The lower court found, and Respondent acknowledges, that John Robertson was in fact prosecuted in a private action where Wykenna Watson alone, in furtherance of her own interests, invoked the court's power to punish for criminal contempt. Because a criminal punishment cannot be imposed in an action between private parties, and because Ms. Watson lacked the authority to commence or conduct this prosecution on her own behalf – a prosecution that the public prosecutor representing the United States

had chosen not to pursue – Robertson's sentences for criminal contempt must be set aside. Moreover, this Court should decline the United States' invitation to recharacterize the prosecution as one on behalf of the United States, because the government's proposal contradicts its own account of the facts in the lower court and fails to accord deference to the lower court's well-supported factual findings as well as its interpretation of District of Columbia law.

If this Court deems Ms. Watson to represent the United States, it must conclude that the prosecution of Mr. Robertson should have been barred by his plea agreement. The promise by the United States Attorney for the District of Columbia that the "gov't" would not pursue any charges relating to the events at issue bound the United States, through any counsel, from bringing a prosecution for such events in the District of Columbia courts.

ARGUMENT

BECAUSE THE CONSTITUTION REQUIRES THAT ALL PROSECUTIONS FOR CRIMINAL CONTEMPT IN CONGRESSIONALLY CREATED COURTS BE CONDUCTED ON BEHALF OF THE UNITED STATES PURSUANT TO ITS SOVEREIGN POWER, PETITIONER'S SENTENCES FOR CRIMINAL CONTEMPT MUST BE VACATED.

A. THE CONSTITUTION REQUIRES THAT CRIMINAL CONTEMPT PROSECUTIONS IN CONGRESSIONALLY CREATED COURTS BE PURSUED ON BEHALF OF THE GOVERNMENT AND PURSUANT TO ITS SOVEREIGN POWER.

The holding of the District of Columbia Court of Appeals that Petitioner's prosecution for criminal contempt was constitutionally "conducted as a private action brought in the name and interest of [Ms.] Watson, not as a public action brought in the name and interest of the United States or any other governmental entity," Cert. Pet. App. A.14, ran afoul of the fundamental constitutional proposition that criminal actions must be prosecuted in the name of the sovereign and pursuant to its power, and that criminal contempt, like any crime, is a "public wrong." Pet. Br. 11-12. The text and history of the Constitution and this Court's constitutional jurisprudence demonstrate that, "at root, there are two parties to a criminal action in our system: the government and 'the individual whom [it] seek[s] to

punish.'" *Id.* at 11 (quoting *United States v. Ortega*, 24 U.S. (11 Wheat.) 467, 469 (1826)). The United States has now registered its wholesale agreement with Petitioner's constitutional analysis on this fundamental point. Pet. Br. 14-46; U.S. Br. 12-21.

Respondent focuses on the question whether criminal *contempt* prosecutions need be brought on behalf of the sovereign and offers little to counter Petitioner's claim that crimes are public wrongs which only the sovereign may constitutionally prosecute. *See* Resp. Br. 38 (characterizing the argument as "beside the point"). She relies on *Williams v. Florida*, 399 U.S. 78 (1970), to contend that even if criminal actions were understood to be exercises of sovereign power at common law, it "does not follow" that the Framers incorporated this feature of the common law into the Constitution. Resp. Br. 18-22. But the conception of crime as a public wrong is not a "historical accident," *Williams*, 399 U.S. at 89, as this Court characterized the twelve-person jury at issue in *Williams*, nor can the principle that a criminal proceeding must be an exercise of sovereign power be dismissed as an "incidental" feature of our legal system. *Id.* at 91. To the contrary, "the principle that criminal prosecution represents the exercise of sovereign power was 'indispensible' to the common law's understanding of crimes as a public offense." U.S. Br. 13 n.4. Because *Williams* is inapposite, Respondent fails to rebut Petitioner's claim that the Framers' understanding of the prosecution of crime as

a sovereign function was incorporated into the Constitution.

Respondent makes the more narrow assertion that there existed no settled view in the common law that criminal *contempt* actions must be brought pursuant to sovereign power. Resp. Br. 23-32. Without addressing the wealth of authority cited by Petitioner, Pet. Br. 36-39, she suggests that early cases holding that the jury trial right does not attach in criminal contempt cases demonstrate that the Framers did not view contempt as a "crime" for constitutional purposes. Resp. Br. 23-24. But as this Court stated in *Bloom v. Illinois*, 391 U.S. 194, 198 n.2 (1968), the history of the applicability of jury trials to criminal contempt is not "sufficiently simple or unambiguous" to rest a constitutional decision solely on historical grounds. And even if the history were unambiguous, the historical status of jury trials for criminal contempt does not undermine pervasive evidence that the Framers understood criminal contempts to be crimes and public wrongs. *See, e.g.*, *Gompers v. United States*, 233 U.S. 604, 610 (1914) ("If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech."); *Bloom*, 391 U.S. at 201 n.3 (citing cases).

Respondent also asserts that the Framers would not have viewed the criminal contempt here as a "crime" because it was a petty offense. Resp. Br. 24. But Petitioner's claim is not that a jury trial right should have attached, but that contempt is a "crime

in the ordinary sense." *See Taylor v. Hayes*, 418 U.S. 488, 495 (1974) ("[P]etty contempt *like other petty criminal offenses* may be tried without a jury.") (emphasis added). This Court's conception of criminal contempt as a "separate public action brought on behalf of the government" is "consistent with the status of criminal contempt at common law." U.S. Br. 19-20. Respondent offers no persuasive authority to the contrary.

As a tactical matter, Respondent bifurcates the question presented, discussing pleading requirements and the styling of captions as if they captured the essence of Petitioner's claim that criminal contempt actions can only be constitutionally brought "in the name" of the sovereign, and insisting that the question of in whose "power" the action was brought was never raised. Resp. Br. 23, 43. But Petitioner's claim has never been one of titles.[1] By framing the question presented as whether the criminal contempt action could be brought "in the name and pursuant to the power of" a private individual, Petitioner incorporated language used below to identify who had the interest in the case and the power to control it. The United States described the proceeding as a "private right of action," which conferred upon the litigant the "right to conduct" the action "in his or her own name and interest." U.S. C.A. Br. 10. Respondent Watson

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[1] The cases Respondent cites regarding the technical requirements of titling are therefore inapposite. Resp. Br. 28.

referred to a "private right of action," contending that she was the "party-in-interest" to the proceeding. Appellee C.A. Br. 17. Petitioner used similar terms. Appellant C.A. Post-Arg. Br. 9 ("Under our law, criminal prosecutions are an exercise of sovereign power. Thus, even when the complainant or his or her privately retained counsel pursue them, criminal prosecutions are and always have been maintained 'in the name of' the particular sovereign at issue."). When the lower court concluded that the case was brought as a "private right of action," prosecuted "in the name of Ms. Watson," not the sovereign, it clearly issued a ruling about in whose interest the case was brought and who had the power to control it. Cert. Pet. App. A.12, A.17.

By focusing on technical pleading issues, Respondent avoids confronting the essence of the lower court's ruling and the issue presented.[2] For instance, while Respondent cites commentator Stewart Rapalje for the proposition that whether a criminal contempt proceeding is "brought in the name

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[2] Even cases Respondent cites reference the principle that criminal contempt proceedings are brought to vindicate the public's interest. *See, e.g., In re Crumpacker*, 431 N.E.2d 91, 95 (Ind. 1982) ("The cause was certainly initiated for the public's interest and prosecuted by an arm of state government."); *Manderscheid v. Dist. Court of Plymouth Co.*, 28 N.W. 551, 552 (Iowa 1886) ("[I]t was proper to conduct the proceedings for contempt under the titles of the respective equity cases, for it was against the judicial authority exercised in those cases that the alleged acts of contempt were committed.").

of the sovereign" is a "comparatively unimportant matter," about which the practice was "not harmonious," Resp. Br. 31, 28, she draws her quotations from the section of his treatise titled "Entitling the Proceeding." *See* Stewart Rapalje, *A Treatise on Contempt* § 95 (1884). As to the fundamental question of in whose interest a criminal contempt action is brought, Rapalje was clear: "the state alone is interested" although the private party may "receive[ ] an incidental advantage." *Id.* at § 21.

Petitioner takes no issue with Respondent's claim that the question of titling is a "comparatively unimportant matter" and not a "constitutional requirement." Resp. Br. 31-32. [3] Because Petitioner never claimed that titling in his case produced constitutional error, Respondent gains no ground by demonstrating otherwise.

Nor does Respondent gain any ground by her reference to the history of private prosecutions in this country. Resp. Br. 38-42. In his opening brief, Petitioner clarified that the "critical understanding that all criminal prosecutions were brought on behalf of the sovereign was in no sense compromised" by the acknowledged practice of private prosecutions, because in England as in America, all such prosecutions were brought in the name of and pursuant to the power of

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[3] The United States also makes the uncontroversial point that the styling of a case is not a "matter subject to constitutional requirements." U.S. Br. 22.

the sovereign. Pet. Br. 25.[4] The United States makes precisely the same point. U.S. Br. 14-15. Petitioner has challenged neither the authority of a court to appoint a private prosecutor to represent the sovereign in a criminal contempt action – the authority approved in *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987) – nor the constitutionality of a prosecution in which an interested party assumes the role of the private prosecutor – the issue left unresolved in *Young*. Pet. Supp. Br. 10.[5] Rather,

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[4] Even the cases Respondent cites acknowledge the public nature of criminal contempt prosecutions. *See, e.g., Tonkin v. Michael*, 349 F. Supp. 78, 81 (D.V.I. 1972) ("public prosecutor must supervise the actual conduct of the case"); *Katz v. Commonwealth*, 399 N.E.2d 1055, 1060 (Mass. 1979) (Commonwealth "is the adverse party"); *State v. Martineau*, 808 A.2d 51, 54 (N.H. 2002) (public prosecutor may *nol pros* private prosecutions over objection of private prosecutors); *State v. Storm*, 661 A.2d 790, 793 (N.J. 1995) (statute permits private lawyer to prosecute actions '"for and on behalf of the State or the municipality'") (citation and emphasis omitted); *People ex rel. Allen v. Citadel Mgmt. Co., Inc.*, 353 N.Y.S.2d 976, 979 (N.Y. Crim. Ct. 1974) (when defendant "'has committed a crime against the people of the state, it is for the people of the state to say by whom they shall be represented on his trial'") (citation omitted); *Olsen v. Koppy*, 593 N.W.2d 762, 765 (N.D. 1999) (court may appoint private counsel to represent interests of the state).

[5] For this reason, many of the concerns raised by the non-governmental amici supporting Respondent are not implicated. Although amici portend that a ruling in Petitioner's favor will mean that many civil protection order ("CPO") violations will go unaddressed, *e.g.*, DV Leap *et al.* Br. 11; Family Law Judges Br. 17, Petitioner never has suggested that a CPO beneficiary lacks the ability to bring such violations to a court's attention or to request that the court issue an order to show cause. Similarly,

(Continued on following page)

Petitioner has challenged the constitutionality of his prosecution in a "private right of action" that Ms. Watson conducted as the true party in interest.

Ultimately, Respondent's claim that a private party may constitutionally pursue a criminal contempt action in federal court rests on her general assertion that "contempt is different." She enumerates "differences" between criminal contempt and traditional crimes and suggests, without explanation, that the right of a private party to prosecute a criminal action on her own behalf should be added to the list. Resp. Br. 26-27. But the procedural differences Respondent identifies have each been countenanced by this Court as necessary deviations from traditional criminal procedure requirements to accommodate a

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while amici assert that public prosecutors have been unable or unwilling to prosecute CPO violations, *e.g.*, DV Leap *et al.* Br. 17; NCVLI Br. 20, a ruling that all criminal contempt prosecutions in congressionally created courts must be maintained in the name and power of the United States would not preclude interested CPO holders or their counsel from representing the United States in such prosecutions. And, although the amici's concerns of underenforcement are not implicated in this case, Petitioner notes that the majority of the studies amici cite in support of their "underenforcement" argument are a decade or more outdated. *See, e.g.*, DV Leap *et al.* Br. 11-22 (citing studies primarily from the 1990s). As amicus in support of Petitioner outlines, recent developments have increased resources for public prosecution of domestic violence. NACDL Br. 20-27. This shift illustrates the corrective function of the democratic process: When the public disagrees with the executive's enforcement priorities, it elects more responsive government officials.

court's need to vindicate its dignity or authority.[6] Respondent makes no attempt to tie the exceptional notion that a criminal contempt can constitutionally be prosecuted in a federal court by a private party on her own behalf to the firmly rooted doctrine of necessity, nor to explain how such a private right of action is consistent with the peculiarly public nature of contempt. *See* Pet. Br. 46-51.

Finally, Respondent has no adequate response to Petitioner's argument that a criminal contempt action in which the power to prosecute is shifted entirely out of the hands of the government into the hands of a private party who has no obligation to ensure "that justice shall be done," *Berger v. United States*, 295 U.S. 78, 88 (1935), does not comport with

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[6] *See Young*, 481 U.S. at 801 ("While a court has the authority to initiate a prosecution for criminal contempt . . . the rationale for the appointment authority is necessity."); *Pounders v. Watson*, 521 U.S. 982, 988 (1977) ("immediate punishment is essential to prevent 'demoralization of the court's authority' before the public") (citation omitted); *Green v. United States*, 356 U.S. 165, 183 n.14 (1958) (relying on "general statements of the nature of the contempt power and its indispensability to federal courts" in concluding that the grand jury right is inapplicable), *overruled in part by Bloom*, 391 U.S. at 208; *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) (while traditional crimes can only be defined by statute, common law power to punish for contempt "cannot be dispensed with in a Court, because [it is] necessary to the exercise of all others").

the Due Process Clause.[7] The United States acknowledges the problem, by noting that due process "obligations thought integral to the defendant's ability to receive a fair trial" constrain only governmental actors. U.S. Br. 16.[8] Ms. Watson responds with

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[7] Respondent is wrong to contend, Resp. Br. 59-60, that Petitioner did not present a due process argument to the lower court. *See* Appellant C.A. Br. 23 ("Indeed, the notion that a private person – in her capacity as a private person – could impose a criminal punishment on another person is an anathema to our modern notions of due process."); Appellant C.A. Post-Arg. Br. 20 n.12. (citing Due Process Clause).

[8] The United States notes that criminal contempt prosecutions by private parties *on behalf of the sovereign* may present due process concerns that are not present in this case. U.S. Br. at 23-29. Petitioner agrees that such issues are not raised (save any due process claim based upon *Santobello v. New York*, 404 U.S. 257 (1971)), as he has challenged the constitutionality of a criminal contempt proceeding brought *on behalf of a private party*. As to Petitioner's argument that a criminal contempt prosecution in a federal court unmoored from the doctrine of necessity raises separation of powers concerns, Pet. Br. 51-55, the United States and Respondent contend that the constitutional separation of powers doctrine does not apply in the District of Columbia, while conceding there may be a comparable statutory right. U.S. Br. 25-27; Resp. Br. 52-54. This Court has never decided the question, *see Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 266 (1991) (referring to the "unsettled question whether the District of Columbia acts as a State or as an agent of the Federal Government for separation-of-powers purposes"), and neither Respondent nor the United States address Petitioner's argument that *Springer v. Philippine Islands*, 277 U.S. 189 (1928), applied a constitutional separation of powers analysis in comparable circumstances. *See also Metro. Washington Airports Auth.*, 501 U.S. at 274 (using *Springer* in constitutional analysis).

the counter-factual assertion that the government had "control" in this case because her lawyer at the time was a District of Columbia Assistant Attorney General ("AAG"), and because the trial court had discretion to decide whether to "grant the motion to issue a show-cause order" and to "select[ ] . . . the issues to be tried." Resp. Br. at 60-61. As Petitioner demonstrates in detail later in this brief, *see infra* pp. 20-25, neither the AAG nor the court exercised control over the decision whether to prosecute Mr. Robertson or what charges to file. The AAG acted solely as the attorney for Ms. Watson, and this case did not involve a request for – or the issuance of – an order to show cause. Thus, Respondent is wrong to suggest that these proceedings varied only slightly from those in *Young*.[9]

B. PETITIONER'S SENTENCES FOR CRIMINAL CONTEMPT MUST BE SET ASIDE BECAUSE THEY WERE IMPOSED IN AN UNCONSTITUTIONAL PRIVATE CRIMINAL ACTION.

1. This Court's Decision in *Gompers v. Buck's Stove & Range Co.* Requires that Mr. Robertson's Sentences Be Set Aside.

Petitioner argued in his opening brief that because his criminal punishment was imposed in

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[9] Respondent's characterization of *Young* is also inaccurate, Resp. Br. 26, 61, as the contempt proceeding in *Young* commenced upon motion of a party, not on the court's "own motion" as Respondent suggests. *Young*, 481 U.S. at 792.

litigation between private parties, *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418 (1911), requires that his sentence be set aside. Pet. Br. 40-41; *see also id.* at 45 (arguing that contempt prosecution against Michael Foster in *United States v. Dixon* would be "void" under *Gompers*, and not a bar to subsequent jeopardy, given lower court's interpretation of the statute). Indeed, the grounds for setting aside Petitioner's sentences are more compelling than in *Gompers* because Ms. Watson invoked the judicial power solely through an unconstitutional private right of action. *See Young*, 481 U.S. at 815 (Scalia, J., concurring) (contempt convictions resulting from appointment of private prosecutor that exceeded judicial power of the United States are void, where "we cannot know whether petitioners would have been prosecuted had the matter been referred to a proper prosecuting authority"); *cf. Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979) (litigant has a "cause of action" if she is "a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court").

Unlike Respondent, the United States offers no response to this argument, suggesting that the holding of the lower court that the prosecution was conducted as a private right of action was "not necessary" to the court's ruling, which it characterizes as solely resolving a plea breach claim. U.S. Br. 29. But Petitioner argued to the lower court that "there is no such thing in our legal system as a criminal action maintained 'in the name of' a private person," and

that such an action is "foreclosed by binding decisional law and is completely lacking in historical pedigree." Appellant C.A. Post-Arg. Br. 2. When the lower court decided the case, it cited and responded to Petitioner's claim. Cert. Pet. App. A.10 (quoting Robertson's argument). The structure of the lower court opinion makes this clear: it first held that D.C. Code § 16-1005(f) authorizes a private right of action for criminal contempt, Cert. Pet. App. A.12-13, then found that this case was in fact prosecuted by Ms. Watson in her own name and interest pursuant to that statute, *id.* at A.14, and then concluded that such a prosecution is lawful and constitutional, *id.* at A.14-15 (relying on Justice Blackmun's dissent in *United States v. Dixon*, 509 U.S. 688 (1993), and language from *In re Debs*, 158 U.S. 564, 596 (1895)). Only after resolving these issues did the court turn to the plea breach claim, which, given the rulings the court had already made, became an easy question: Ms. Watson, as the party to the contempt proceeding, was not bound by a plea agreement executed by the United States. *Id.* at A.17. Because the lower court found that the proceeding was a private right of action – and denied the plea breach claim wholly on that basis – it needed to address Petitioner's claim that such an action was unconstitutional and entirely foreign to "our legal system" in order to resolve the case.

Respondent, who identifies herself as the only party to this proceeding and has consistently asserted that she brought this case as a private right of

action,[10] addresses Petitioner's *Gompers* claim on its merits. First, she characterizes *Gompers* as a case involving the deprivation of procedural rights and suggests that this case is distinguishable because Petitioner had notice of the criminal nature of the contempt action and was not required to testify. Resp. Br. 34. But the Court's decision to vacate the sentence in *Gompers* did not rest on a determination that Gompers was denied the benefit of procedural safeguards. The *Gompers* Court looked to the procedures employed solely in an attempt to define the *type of proceeding* involved in the case, after Buck's Stove & Range Company argued that the Court could not consider the record because the proceeding had been in equity. *See Gompers*, 221 U.S. at 444 ("The question as to the character of such proceeding has generally been raised, in the appellate court, to determine whether the case could be reviewed by writ of error or on appeal."). Once the Court concluded that the proceeding had been in equity, the Court observed that there had been a "departure – a variance – between the procedure adopted and the punishment imposed." *Id.* at 449. This result, the Court said, was "as fundamentally erroneous as if in an action of 'A v. B, for assault and battery,' the

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[10] Resp. Cert. Opp. ii ("List of Parties"); *id.* at 9 ("private right to pursue criminal contempt"); *id.* at 12 ("essential facts" include "authority to prosecute in . . . her own interest."); Resp. Br. ii ("Parties to the Proceeding"); *id.* at 43 (Respondent authorized by District law "to initiate the proceeding on her own").

judgment entered had been that the defendant be confined in prison for twelve months," *id.*, and it was in light of this *variance* that the Court ultimately determined that "it would be necessary to set aside the order of imprisonment." *Id.*[11] Respondent's suggestion that *Gompers* turned on whether procedural rights were afforded finds no support in the Court's opinion.

Second, Respondent notes that *Gompers* was decided before the merger of law and equity and cites *United States v. United Mine Workers of Am.*, 330 U.S. 258, 299 (1947), for the proposition that after the merger of law and equity, this Court "had no difficulty sustaining criminal contempt convictions brought in the same proceeding as a civil contempt." Resp. Br. 33. This characterization of *United Mine Workers* is misleading, however, because the claim there *was* of procedural unfairness, *not* that the punishment must be set aside because it was imposed in a civil proceeding. *See United Mine Workers*, 330 U.S. at 295 ("The defendants have pressed upon us the procedural aspects of their trial and allege error so prejudicial as to require reversal of the judgments for civil and criminal contempt"). Furthermore, because the United States *was the party* in both the civil and criminal action involved, *id.* at 300, the Court was not

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[11] Petitioner stated that the *Gompers* Court determined that the contempt "proceeding" at issue was criminal, Pet. Br. 40, when in fact the Court determined that the "punishment" was criminal. Resp. Br. 32-33. This error affects Petitioner's analysis in no material respect.

presented with a claim that criminal punishment was imposed in a contempt litigation between private parties. While *Gompers* was decided prior to the merging of law and equity, the holding in the case – that a criminal punishment imposed in an action between private parties must be set aside – has in no sense been eroded.

2. This Court Should Decline the Invitation of the United States To Recharacterize the Proceeding as a Public Action on Behalf of the Sovereign, Because the Lower Court Found as a Matter of Fact and Local Law that the Prosecution Was Initiated and Controlled by a Private Person Acting on Her Own Behalf and the Record Supports that Determination.

Instead of addressing the question of what remedy is appropriate when a criminal punishment is imposed in a proceeding that was *not* brought pursuant to the power of the sovereign, the United States suggests that this Court avoid the remedy issue by recharacterizing the proceeding below as one that was. U.S. Br. 21 ("[T]he court of appeals erred on this abstract question of characterization. The criminal contempt prosecution here, like any other, was an exercise of sovereign power.").[12] But the lower

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[12] Now asserting that this is a case "in which the United States is interested" within the meaning of 28 U.S.C. § 518(a), "the Solicitor General has authorized private counsel for

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court held, *as a factual matter*, that "[t]he criminal contempt prosecution in [this] case *was conducted* as a private action brought in the name and interest of [Ms.] Watson, not as a public action brought in the name and interest of the United States or any other governmental entity." Cert. Pet. App. A.14 (emphasis added) (quotation omitted). Indeed, the United States made this precise argument to the court below, acknowledging its factual nature: "The criminal contempt proceeding in the present case was *in fact* conducted as a private action, in the name and interest of Watson." U.S. C.A. Br. 4 (emphasis added). Whether or not it is appropriate for the United States to switch course at this point, *cf. New Hampshire v. Maine*, 532 U.S. 742, 749 (2001), the government now offers this Court no basis to reject the factual findings

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respondent *to appear on her behalf*" and argue "in support of a purely private right of action." U.S. Br. 1-2 n.1 (emphasis added). Provision of this consent cannot be deemed the "same course" the government followed in *Young*, as the government asserts. *Id.* In *Young*, 481 U.S. 787, the government authorized the private prosecutor to represent the United States, not a private party such as Ms. Watson; the private prosecutor claimed to represent the United States, unlike Respondent's counsel here; and the private prosecutor's argument was not inconsistent with the claim that he represented the United States, as Respondent's defense of a private right of action is here. *See* U.S. Amicus Br. at 2 n.1, *Young*, 481 U.S. 787 (No. 08-1329). Certainly 28 U.S.C. § 518 does not require the Solicitor General to give an attorney consent to represent a *private party* before this Court. The awkward letter of consent provided by the Solicitor General exposes the flaw in the United States' claim that this Court can effectively recharacterize the proceeding as one brought on behalf of the United States.

of two lower courts.[13] *Graver Tank & Mfg. Co., Inc. v. Linde Air Prods., Co.*, 336 U.S. 271, 275 (1949).

The court of appeals also held, a matter of local law, that D.C. Code § 16-1005(f) authorized this prosecution to be litigated as a private right of action. Cert. Pet. App. A.12-13. As the District of Columbia demonstrates, this Court usually defers to the District of Columbia Court of Appeals on matters of local law. D.C. Br. 14-20 (citing *Pernell v. Southall Realty*, 416 U.S. 363, 368-69 (1974)). The "recharacterization" suggested by the United States requires this Court to reach beyond the question presented to disturb not only the factual findings of the court below, but its legal conclusion on a matter of local law as well. This Court should decline to do so.

Moreover, the lower court was correct to conclude that this case was brought by Ms. Watson in her own name and interest, as neither a public prosecutor nor the trial judge initiated the prosecution or believed itself authorized to interfere with Ms. Watson's exercise of the broad discretion traditionally exercised by a public prosecutor. As to initiation, Ms. Watson commenced this action by filing a "Motion to Adjudicate Criminal Contempt," supported by an affidavit that listed five alleged violations of the civil

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[13] The trial court found that Ms. Watson "was pursuing [the contempt charges] with the [Office of the Attorney General] as her counsel." J.A. 92; *see also* Tr. 5/10/2000 95 ("[T]his case is . . . not brought in the name of the United States[;] it could be but it's not . . . .").

protection order. J.A. 56-60. The motion was filed pursuant to D.C. Super. Ct. Intra-Fam. R. 7(c),[14] which contemplated the prompting of a ministerial act – the issuance by the clerk of a notice of a hearing – as opposed to the issuance of a show cause order by the judge.[15] The trial judge never issued an order to show cause; rather, she treated Ms. Watson's affidavit outlining five counts of contempt as the charging document in the case. *See* Tr. 5/10/2000 3-5 (when parties appear for trial, court proceeds immediately to opening statements); Tr. 5/11/2000 33-36 (trial court renders verdict on "separate counts" alleged in Ms. Watson's affidavit). She thus exercised no discretionary control over the initiation of the action or the selection of the charges.

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[14] "When a motion for contempt is filed alleging violation of a civil protection order or temporary protection order, the Intrafamily Clerk shall issue a notice of hearing and order directing appearance." Pet. Br. App. 11.

[15] The Respondent quotes from the rule as revised in 2000, after the trial in this case, which provides for the issuance of an order to show cause. *See* Resp. Br. 4-5 n.6. The revised court rules reflect the public nature of criminal contempt actions in a number of respects beyond the change in the manner of initiation of the proceedings: they establish separate discovery rules for CPO proceedings and criminal contempt proceedings, D.C. Sup. Ct. Dom. Viol. R. 8; Appellant C.A. App. 89-92, and they now define criminal contempt as "a violation of the law, a public wrong which is punishable by fine or imprisonment or both." D.C. Sup. Ct. Dom. Viol. R. 12(a); Appellant C.A. App. 95. The United States quotes this definition from the revised Rule 12 in its brief, although it was not in effect at the time of Mr. Robertson's prosecution. U.S. Br. 20 n.8.

Certainly no public prosecutor initiated the proceeding here, as the AAG was representing Ms. Watson[16] and the Office of the United States Attorney had already made an informed decision not to bring charges. An Assistant United States Attorney ("AUSA") interviewed Ms. Watson and Vallace Player (the individual at whose house the charged incidents occurred) regarding the events at issue. Pet. Br. 53-54. As the trial testimony revealed, the versions of the two women differed dramatically: Ms. Watson claimed that Mr. Robertson was the aggressor in the fight that preceded the throwing of the lye, although she acknowledged that she brought the Draino bottle to the scene and uncapped it herself. Tr. 5/10/2000 24-25. She denied getting a knife from the kitchen and threatening Mr. Robertson with it immediately prior to his throwing the lye. *Id.* at 77-79. Ms. Player, who was ultimately credited by the trial judge, Tr. 5/11/2000 35, described Ms. Watson as the initiator of the conflict, noted that Ms. Watson uncapped the lye and threatened Mr. Robertson with it, and testified that Ms. Watson ran towards Mr. Robertson with a knife, threatening, "I'm going to kill you, you're dead," before Mr. Robertson threw the lye. Tr. 5/10/2000 127-28, 135-36. Having gathered information from both women, the AUSA decided that the interests of the United States were best served by extending Mr. Robertson a plea offer to the March incident, coupled with an agreement not to prosecute the events in

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[16] Tr. 5/10/2000 98 ("I'm acting as her attorney.").

June. *See* J.A. 50-51; Tr. 4/4/2000 8 (AAG states, "I spoke with the prosecutor at the time that it did not go forward . . . . What they did tell me is that based on witness testimony, they were not going forward with the case"). Thus, the United States certainly did not initiate any charges against Mr. Robertson for this incident; indeed it expressly promised not to do so.[17]

Nor did any public prosecutor view herself as authorized to interfere with Ms. Watson's exercise of discretion in conducting the litigation. The United States Attorney's Office was entirely uninvolved, and the AAG made clear that she was acting solely as Ms. Watson's lawyer. *See* Tr. 5/10/2000 3-4 (statement of

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[17] It would be entirely speculative to conclude that the judge would have pursued a judicially initiated contempt on these facts, where an AUSA had conducted an investigation, declined to pursue the case, and bargained away the right to do so. The judge might also have been influenced by the fact that the events began as a consensual get-together, Tr. 5/10/2000 15, that Ms. Watson returned to the house – where Mr. Robertson was sleeping – later in the evening and prior to the fight with the lye, Tr. 5/11/2000 34, and that despite the stay-away order, Ms. Watson attempted to visit Mr. Robertson in prison after he was sentenced in the felony case, Tr. 5/11/2000 10-11. As a policy matter, the inevitably fluid nature of relationships in the domestic violence context counsels against providing a CPO beneficiary with a private right of action for criminal contempt. *But see* DV Leap Br. 22-23, 35 (citing the fact that CPO beneficiaries might bargain away their right to pursue a contempt prosecution in exchange for civil relief, as well as their "ambivalen[ce]" and the fact that they are "easily intimidated or worn down," as *benefits* of private criminal contempt actions).

AAG, "this is not the [District] Government prosecuting, this is us representing her and it's her case. If she chose to dismiss this case, the [District] Government couldn't continue without her."); J.A. 93 (finding by trial court that this was not a prosecution "controlled by the government"). The judge's role in the proceeding was purely adjudicatory: she considered the counts in Ms. Watson's affidavit as if they were counts in an information and rendered a verdict upon them. Given that the United States played no role in initiating or conducting these proceedings, this Court cannot conclude – contrary to the factual findings of the courts below – that this was a prosecution brought on behalf of the United States. Indeed, this Court need only look to the proceeding before *this* Court – where Respondent's counsel indicates that he represents Ms. Watson, Resp. Br. ii – to see that this is a case that, as a matter of fact, has been and is currently being litigated by a private party on her own behalf, despite the United States' recent attempt to suggest otherwise.

Finally, the United States is wrong to assert that the fact that Ms. Watson represented her own interests and exercised the power to initiate the prosecution on her own behalf has no real bearing on the case, and that Petitioner's concerns flow only to how the prosecution is "characterized" and not how it was "actually conducted." U.S. Br. 28. The United States' suggestion that the case would look exactly the same even if it were recharacterized as a sovereign prosecution overlooks the fundamental point

that if the prosecutorial authority had been limited to a governmental entity authorized to commence the prosecution, it is highly likely that this prosecution would never have happened at all.

C. THE PLEA AGREEMENT BETWEEN THE UNITED STATES AND PETITIONER WOULD HAVE BARRED A PROSECUTION IN WHICH MS. WATSON REPRESENTED THE UNITED STATES.

If this Court determines that the proceeding was on behalf of the United States, it must hold that the prosecution was barred by the plea agreement. The lower court said that the abbreviated word "gov't" on the plea form "clearly referred to the *United States*, not Ms. Watson," and rejected Petitioner's plea claim by noting that he "starts from the faulty assumption that the criminal contempt proceeding against him was brought in the name of the United States." Cert. Pet. App. A.18-19 (emphasis added). And the United States contended in the lower court that if the proceeding had been a judicially initiated contempt action "conducted in the name of the United States even when . . . privately prosecuted," it would "tend to think that the plea agreement in this case could reasonably be interpreted as a promise that no such prosecution would occur." U.S. C.A. Br. 31. Now the government – and Respondent – contend that the plea agreement must be read more narrowly, binding only the "Office of the United States Attorney for the District of Columbia." U.S. Br. 29-31; Resp. Br. 48-49.

The plea agreement cannot reasonably be interpreted in this fashion.

The United States' current assertion that, "[b]y crossing out 'the District of Columbia' and 'Assistant Corporation Counsel,' the AUSA made clear that the plea agreement with petitioner covered only the United States Attorney's Office," U.S. Br. 30, rests on a factual assumption unsupported by the record – that it was the AUSA who crossed out the words – and suggests a clarity of intention that is not present. *See United States v. Gebbie*, 294 F.3d 540, 551-52 (3d Cir. 2002) (ambiguities in plea agreements must be construed against the government) (citing cases). The United States and Respondent highlight modifications on a dual-purpose "plea form" – designed for use both in criminal cases in Superior Court prosecuted by the United States Attorney as well as traffic and related offenses prosecuted by the Office of the Attorney General[18] – that merely conform the caption and the

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[18] In the District of Columbia, prosecutions for violations of police and municipal ordinances and similar offenses are "conducted in the name of the District of Columbia by the [Attorney General] for the District of Columbia," and all other criminal prosecutions are "conducted in the name of the United States by the United States attorney for the District of Columbia." D.C. Code § 23-101. Criminal contempt actions are therefore conducted in the name of the United States and prosecuted – unless a private prosecutor is involved – by the United States Attorney. *See* U.S. C.A. Br. 19-20. Only Congress, not the Council of the District of Columbia, has the authority to alter this allocation of prosecutorial authority. *See In re Crawley*, 978 A.2d 608, 613-14, 620 (D.C. 2009).

signature line to the particular proceeding involved but say nothing about whether the plea agreement binds only certain representatives of the United States. This case does not present the question whether the word "government" in a case brought pursuant to the sovereign power of the United States includes all offices of United States Attorneys.[19] Rather, given that the plea agreement and the subsequent prosecution occurred in the same jurisdiction, the word "gov't" in this plea agreement which was signed by an Assistant United States Attorney for the District of Columbia must be interpreted, at a minimum, to bar anyone acting on behalf of the United States in the District of Columbia courts from prosecuting the dismissed charges – just as the

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[19] Nonetheless, many courts have answered this question in the affirmative – indeed, some quite eloquently: "At stake is the honor of the government[,] public confidence in the fair administration of justice, and the efficient administration of justice in a federal scheme of government." *United States v. Carter*, 454 F.2d 426, 428 (4th Cir. 1972) (en banc); *see also Gebbie*, 294 F.3d at 550 ("United States Attorneys should not be viewed as sovereigns of autonomous fiefdoms."); *United States v. Van Thournout*, 100 F.3d 590, 594 (8th Cir. 1996) ("Absent an express limitation, any promises made by an Assistant United States Attorney in one district will bind an Assistant United States Attorney in another district.") (citing cases). One of the few circuits to hold otherwise has demonstrated discomfort with its position. *See United States v. Annabi*, 771 F.2d 670, 672 (2d Cir. 1985) (noting that, "[a]s an original proposition," an agreement that "the Government" will dismiss charges "might be thought to bar the United States from reprosecuting the dismissed charges in any judicial district," but observing that "the law has evolved to the contrary").

United States stated below it "tended to think."[20] The District of Columbia Court of Appeals has held that the signing of a conditional plea agreement by a private prosecutor in a criminal contempt action must be given effect, rejecting an argument by the United States Attorney for the District of Columbia that the private prosecutor could not give the consent of "the government" to the plea. *See In re Peak*, 759 A.2d 612, 616-617 (D.C. 2000). If a private prosecutor acting on behalf of the United States in District of Columbia courts has the authority to execute a binding plea agreement, it has the concomitant responsibility to abide by such agreements that have been duly executed by the United States through its attorneys.[21]

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[20] D.C. Code § 16-1002(c) does not inform the interpretation of this plea agreement. This provision, which stated that, "[t]he institution of criminal charges by the United States Attorney shall . . . not affect the rights of the [CPO] complainant to seek any other relief under this subchapter," Pet. Br. App. 5, was designed to modify a statutory scheme that initially provided for *either* traditional criminal prosecution *or* civil proceedings designed to secure protection orders, but not both. *See* Report of the Council of the District of Columbia Committee on the Judiciary on Bill 4-195, Proceedings Regarding the "Intra-family Offenses Amendment Act of 1982" at 3 (May 12, 1982) (statutory change designed to "authoriz[e] civil protection cases to coexist legally along side criminal prosecutions"). Prior to the modification, the statute had provided that once a civil protection hearing commenced, "no criminal charge may be filed." *Id.* at 4.

[21] The existence of the local case, *Green v. Green*, 642 A.2d 1275 (D.C. 1994), in which the court of appeals addressed the constitutional issue reserved in *Young*, does not change this analysis. Because the *Green* court rested its holding on the

(Continued on following page)

If this proceeding was brought by Ms. Watson on behalf of the United States, the plea agreement barred this prosecution.

CONCLUSION

The judgment of the District of Columbia Court of Appeals must be reversed.

Respectfully submitted,

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decreased "potential for . . . conflicts of interest," it evidenced its acceptance of the *Young* Court's characterization of a private prosecutor as representing the United States. *Id.* at 1279-80. A reasonable person, in a post-*Green* world, would have believed that a promise by the United States not to prosecute a certain charge would encompass *all* prosecutions brought by the United States – certainly all those brought in the District of Columbia – even if privately prosecuted, because "[p]rivate attorneys appointed to prosecute a criminal contempt action represent the United States." *Young*, 481 U.S. at 804.

SUPPLEMENTAL BRIEF

145 (3)

No. 08-6261

Supreme Court, U.S.
FILED
NOV 17 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JOHN ROBERTSON,

Petitioner,

v.

UNITED STATES *ex rel.* WYKENNA WATSON,

Respondent.

On Petition For Writ Of Certiorari To The District Of Columbia Court Of Appeals

SUPPLEMENTAL BRIEF FOR PETITIONER

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ARGUMENT

Petitioner John Robertson sought this Court's review of the question whether, in a congressionally created court, an action for criminal contempt may be brought in the name and pursuant to the power of a private individual, as opposed to in the name and pursuant to the power of the United States. In Petitioner's view, "[a] criminal prosecution is an exercise of sovereign power; a private person has no more power to prosecute a criminal action in her own name and power than she would have to enter into treaties with foreign nations or to mint a currency." Pet. 4. Both the Court of Appeals and this Court requested the views of the United States on this matter that so directly affects its sovereign power. In the course of two submissions to two courts, the position taken by the United States has shifted dramatically.

In its Court of Appeals brief, the United States contended that the proceeding here was a "private action for criminal contempt brought by [Wykenna] Watson in her own name and interest" (U.S. C.A. Br. 21), and that "criminal contempt prosecutions under D.C. Code § 16-1005(f) may *lawfully* be conducted as private actions." U.S. C.A. Br. 9; *see also id.* at 4 (contending it is "establishe[d] that such prosecutions are constitutional"). The United States secured a favorable ruling from the Court of Appeals as a result; the lower court explicitly relied on the position of the United States, quoting its brief (Pet. App. A10) and stating, "we agree with the United States . . . and

we hold that, under the intrafamily offense statute, a criminal contempt proceeding is properly brought in the name of a private person, here Watson, rather than in the name of the sovereign." Pet. App. A15. This holding was in no sense "artificial" or "abstract," as the United States now suggests. U.S. Br. 8. It enabled the court to deny Mr. Robertson's due process claim that the United States as sovereign had prosecuted the criminal contempt, and that the United States had breached the plea agreement by so doing.

In this Court the United States refrains from asserting that a private criminal right of action in a congressionally created court is lawful, proper, or consistent with the Constitution. No longer is the United States asserting that a criminal contempt prosecution can be "lawfully conducted as a private action in the name and interest of" a private person. U.S. C.A. Br. 23.[1] And failing to acknowledge that it previously took such a position, it never explains why it changed course. This Court should afford great

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[1] The Solicitor General also makes no effort to defend the reasoning of the court below. In his petitions for rehearing and for certiorari, Mr. Robertson sought review because the court's holding rested on the repudiated notion that "'[a] court, enforcing obedience to its orders by proceedings for contempt, is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to.'" Pet. App. A14 (citation omitted). Below, the United States responded: "The unanimous decision of the Court is correct and does not warrant further review." U.S. Reh. Opp. 1. Notably absent from the United States' brief to this Court is any suggestion that the lower court's ruling is *correct*.

weight to the decision of the United States to abandon the affirmative position it took in the lower court.[2] The United States has conceded that this case presents "complex issues that might warrant this Court's attention" and is wrong in its assertions that the issues are not properly framed and that the case is an imperfect vehicle. U.S. Br. 5. The petition for certiorari should be granted.

A. The Issues in this Case Are Properly Framed.

Rather than offering this Court its views on whether the federal, sovereign power to prosecute crime can be lodged in a private individual to prosecute in her own name and pursuant to her own power, the United States faults Petitioner for not raising issues different than the question presented and contends that the precedent Petitioner cites is inapposite. It comes to the latter conclusion only by the most crabbed – or inaccurate – reading of this Court's precedent. The United States contends that Petitioner is wrong to rely on *Bloom v. Illinois*, 391 U.S. 194 (1968), for the proposition that "[c]riminal contempt

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[2] Because the court below expressly relied on a position set forth by the United States that the United States is no longer willing to assert or defend, this Court could grant the petition for certiorari, vacate the judgment below, and remand to the Court of Appeals for consideration in light of the United States' change in position. *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

is a crime in the ordinary sense," suggesting that "what the Court has meant by that statement is that the adjudication of criminal contempt must be attended by many of the same procedural protections for defendants that attend the adjudication of other crimes." U.S. Br. 9. Such a limited interpretation cannot be squared with the language from *Bloom*, which continues beyond the portion that the United States quotes in its brief:

> Criminal contempt is a crime in the ordinary sense; it is a violation of the law, *a public wrong* which is punishable by fine or imprisonment or both. In the words of Mr. Justice Holmes: "These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech."

391 U.S. at 201 (emphasis added, citation omitted). The United States offers this Court no support for the notion that the power to prosecute such "public wrongs" can be lawfully and constitutionally lodged in a private party, who pursues the case not in the name of the sovereign, but pursuant to her own name and power.

The United States faults Petitioner for improperly developing the issue presented, suggesting his argument would have been better supported by citations to civil cases that address the question of what constitutes state action. U.S. Br. 14. But Petitioner

relies on the more fundamental notion of what is a "crime" in our legal system, a concept of significant historical pedigree. In 1892, this Court stated:

> Penal laws, strictly and properly, are those imposing punishment for an offense committed against the state. . . . The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual, according to the familiar classification of Blackstone: "Wrongs are divisible into two sorts or species: private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed 'civil injuries;' the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community, and are distinguished by the harsher appellation of 'crimes and misdemeanors.'"

Huntington v. Attrill, 146 U.S. 657, 667-69 (1892) (quoting William Blackstone, 3 Commentaries *2). And as far back as *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), this Court has made clear that the power to punish violators of the criminal law in this country is a *sovereign* power:

> The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised, without hesitation, whenever the

> sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers. . . . It is a right incidental to the power, and conducive to its beneficial exercise.

Id. at 418; *see also Heath v. Alabama*, 474 U.S. 82, 93 (1985) ("Foremost among the prerogatives of sovereignty is the power to create and enforce a criminal code."); *United States v. Wheeler*, 435 U.S. 313, 320 (1978) ("[I]nherent in any sovereign . . . [is the power] to determine what shall be an offense against its authority and to punish such offenses."). This Court relied on precisely these principles in *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005), when interpreting a Colorado statutory scheme governing the issuance of civil protection orders and the initiation of contempt proceedings. 545 U.S. at 765 ("The serving of public rather than private ends is the normal course of the criminal law because criminal acts, 'besides the injury [they do] to individuals, . . . strike at the very being of society.'") (citations omitted).[3] Nowhere in its brief is the United States able to explain how the quintessentially sovereign power to prosecute crime can properly be transformed,

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[3] The *Castle Rock* Court also relied on the language from *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973), that, "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another," which Petitioner cited to this Court and the United States suggests is inapposite. U.S. Br. 13.

whether by statute or by judicial order, into an individual power to prosecute a private wrong as a crime.

Instead of offering its views on the question presented, the United States focuses on Petitioner's purported "litigation strategy" – identifying issues it claims Petitioner has conceded and others it believes Petitioner should have raised. U.S. Br. 5. These arguments rest in large part on an imprecise presentation of Petitioner's view of *Green v. Green*, 642 A.2d 1275 (D.C. 1994), a case relied upon by the court below. Larry Green appealed his conviction for criminal contempt pursuant to D.C. Code § 16-1005(f), contending that the private prosecution of the criminal contempt by an interested party violated this Court's holding in *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787 (1987), or, in the alternative, the Due Process Clause. The District of Columbia Court of Appeals rejected Green's claims, noting that the "case does not present the potential for discovery abuses and financial conflicts of interest the *Young* Court addressed." 642 A.2d at 1279-80. The very fact that the *Green* court spoke of "conflicts of interest" reflected its awareness that the private prosecutor in that case was *representing the sovereign*, as there would be no potential for a conflict of interest if she were bringing the criminal action "in her own name and interest." Thus, although in a footnote the *Green* court stated that it was "satisfied that the Council intended that considerations supporting a private right of action to seek a CPO apply equally to a private right of action to enforce the CPO through

an intrafamily contempt proceeding," *id.* at 1279 n.7, the court's words could not be read, consistent with the rest of the opinion, as holding that § 16-1005(f) permits a private party to bring a criminal case in her own name and interest. The issue was not presented and such a conclusion would have been inconsistent with the holding of the case.[4]

The United States urged the *Robertson* court to read the footnote in *Green* as a holding, and the *Robertson* court followed suit. U.S. C.A. Br. 12 n.6; Pet. App. A12, A15. But when the United States asserts in this litigation that, "Petitioner does not contest *Green*" (U.S. Br. 6), it is correct only to the extent that Petitioner did not challenge the holding in *Green* that, in an intrafamily contempt proceeding under § 16-1005(f), a private, interested party can serve as a private prosecutor as that term was understood by this Court in *Young*. The United States is entirely *incorrect* in its suggestion that Petitioner "recognizes" or believes that the Court of Appeals in *Green* "construed District of Columbia law to confer a private right of action for criminal contempt on the holder of a CPO," and that he strategically declined to challenge such a holding. U.S. Br. 6. It was the

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[4] Indeed, in its brief before this Court, unlike in its brief below, the United States refers to the relevant language in *Green* as an "observation" or a "conclusion," but not a "holding." U.S. Br. 6. It is only when discussing the decision in *Robertson* that the Solicitor General states that the court "held" that the respondent has a private right of action to enforce her CPO through a criminal contempt proceeding. *Id.*

Robertson court that first held that § 16-1005(f) confers a private criminal right of action on the holder of a CPO. And Petitioner most certainly *does* "ask this Court, as the ultimate arbiter of District of Columbia law, to review that statutory holding." Pet. 22 (citing *Whalen v. United States*, 445 U.S. 684, 687 (1980)).

Petitioner explicitly contended in his petition that this Court should overturn the statutory holding as inconsistent with *United States v. Dixon*, 509 U.S. 688 (1993), which held that § 16-1005(f) punishes a "crime in the ordinary sense," and that such prosecutions are public cases brought in the name and power of the United States. Pet. 3. The United States fails in its attempt to harmonize the decision below with this Court's holding in *Dixon*. At root, the court below held that the criminal contempt action prosecuted pursuant to § 16-1005(f) was an action between private parties, brought by Ms. Watson in her own name and interest against Petitioner. Yet the Double Jeopardy Clause does not apply to actions between private parties. *United States v. Halper*, 490 U.S. 435, 451 (1989) ("The protections of the Double Jeopardy Clause are not triggered by litigation between private parties."), *abrogated on other grounds by Hudson v. United States*, 522 U.S. 93 (1997). Given this most fundamental constitutional fact, the judgment below cannot be harmonized with *Dixon*. For this reason alone, this Court should grant review and reverse. Pet. 4.

The only issue Petitioner declined to raise in this case was the question this Court did not reach in *Young*: whether the Due Process Clause prohibits a private, interested party from prosecuting a criminal contempt action on behalf of the sovereign. Petitioner raised the more fundamental claim that a criminal action in a congressionally created court cannot, consistent with the Constitution, be brought in the name and pursuant to the power of a private individual. The United States devotes significant energy to its attempt to convince this Court that Petitioner's claim is somehow weakened by his decision not to raise the due process claim reserved in *Young*. It does little to explain, however, why the fact that the *Young* issue is not presented makes the claim Petitioner *does* present any less worthy of this Court's review. U.S. Br. 8, 15. The United States' attack on Petitioner's litigation strategy is unconvincing; having declined to defend the judgment below, the United States offers this Court little to support its suggestion that the petition be denied.

B. There Is No Merit to the United States' Claim that this Case Is an Unsuitable Vehicle for this Court's Review.

The United States suggests that this case is an unsuitable vehicle for review, citing procedural bar

arguments that are plainly inapplicable.[5] These arguments are mere diversions, as the court below resolved this case solely on the merits. The United States also suggests that review should not be granted because "it is not clear" that petitioner seeks an appropriate remedy for the breach. U.S. Br. 19.[6] But because the remedy question was never addressed below, it is not, as the United States characterizes it, a "predicate" (*id.*) to relief from this Court. *See Corley v. United States*, ___ U.S. ___, 129 S. Ct. 1558 (2009) (vacating and remanding for consideration by court of appeals of issues not previously addressed). Finally, the United States contends that review should be denied because "no logic justifies construing the agreement to cover a private prosecutor who, at the time of the agreement, was understood by local law to pursue such claims in her own right." U.S. Br. 17.[7] But it was not until

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[5] Plain error does not apply because the plea breach claim was raised on appeal from a collateral attack. *United States v. Frady*, 456 U.S. 152, 164 (1982). "Cause and prejudice" does not apply because Petitioner's collateral attack alleged ineffective assistance of counsel and was filed during the pendency of the direct appeal. *Shepard v. United States*, 533 A.2d 1278 (D.C. 1987).

[6] Petitioner sought specific performance. *See Roye v. United States*, 772 A.2d 837, 840 (D.C. 2001) ("When specific performance can be accomplished, it is preferred to other remedies for breach of the plea agreement.").

[7] The United States now asserts that even if the respondent were representing the United States, she would not be bound by the plea agreement. U.S. Br. 15. Below, the United States viewed the question differently. U.S. C.A. Br. 31 ("[W]e tend to

(Continued on following page)

Robertson was decided that anyone would have understood the local law in the District of Columbia to permit a private party to pursue a criminal contempt action in her own name and interest. *Green* did not so hold. If the criminal contempt proceeding here were properly construed as an action between Petitioner and the United States, then the prosecution of Petitioner by the United States for the events at issue would have been a clear violation of the plea agreement. The Due Process Clause entitles Petitioner to a remedy for that breach.

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think that the plea agreement in this case could reasonably be interpreted as a promise that no such prosecution [of a privately prosecuted contempt brought in the name and interest of the United States] would occur."). The District of Columbia Court of Appeals has held, in a contempt case not involving the intra-family statutory scheme, that a plea agreement signed by a private prosecutor binds the United States. *In re Peak*, 759 A.2d 612 (D.C. 2000).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
MAR 6 - 2009
OFFICE OF THE CLERK

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JOHN ROBERTSON, PETITIONER

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UNITED STATES, EX REL. WYKENNA WATSON

ON WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether an action for criminal contempt in a congressionally created court may constitutionally be brought in the name and pursuant to the power of a private person, rather than in the name and pursuant to the power of the United States.

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ON WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

The Court's order granting certiorari limited the question to "[w]hether an action for criminal contempt in a congressionally created court may constitutionally be brought in the name and pursuant to the power of a private person, rather than in the name and pursuant to the power of the United States." 130 S. Ct. 1011 (2009). The United States has an interest in the proper resolution of that question. In addition, the judgment of conviction at issue in this case remanded petitioner to the custody of the Attorney General of the United States or his authorized representative. See D.C. Code § 24-201.26 (2001). The United States thus has an interest in the validity of that judgment.[1]

[1] The United States believes this case falls within the scope of 28 U.S.C. 518(a), which provides that unless "the Attorney General in a

STATEMENT

Following a bench trial in the Superior Court of the District of Columbia, petitioner was convicted of three counts of criminal contempt, in violation of D.C. Code § 16-1005(f) (2001). The court sentenced petitioner to three consecutive 180-day terms of imprisonment, with one of those terms suspended in favor of five years of probation. The District of Columbia Court of Appeals affirmed. J.A. 63-65; Pet. App. A1-A25.

1. Section 16-1003 of the D.C. Code permits any victim of domestic violence to petition for a civil protection order (CPO) in family court, and Section 16-1005(f) provides that any violation of a temporary or permanent CPO issued by that court "shall be punishable as contempt." Section 16-1005(g) further provides that "[u]pon conviction," such criminal contempt "shall be punished by a fine not exceeding $1,000 or imprisonment for not more than 180 days, or both."

In *Green* v. *Green*, 642 A.2d 1275 (1994), the District of Columbia Court of Appeals interpreted Section 16-1005(f) to "reflect a determination by the Council [of the District of Columbia] that the beneficiary of a CPO should be permitted to enforce that order through

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particular case directs otherwise," the Solicitor General is to conduct and argue all cases in this Court "in which the United States is interested." *Ibid.*; see *United States* v. *Providence Journal Co.*, 485 U.S. 693, 700 (1988). In order to ensure that the Court has the benefit of the arguments in support of a purely private right of action in a case such as this, the Solicitor General has authorized private counsel for respondent to appear on her behalf in this Court. Accordingly, the Solicitor General files this brief on behalf of the United States as amicus curiae. The United States followed the same course in *Young* v. *United States ex rel Vuitton et Fils S.A.*, 481 U.S. 787 (1987). See U.S. Amicus Br. at 2 n.1, *Young*, *supra* (No. 08-1329).

an intrafamily contempt proceeding." *Id.* at 1279. According to the court, when the Council amended the District's intrafamily offenses statute in 1982, the Council created a private right of action to obtain a CPO because the Office of the Attorney General for the District of Columbia (OAG) (then called the Office of the Corporation Counsel)[2] was unable to effectively prosecute incidents of domestic violence. *Id.* at 1279 n.7. The court then observed that OAG had professed a similar inability to effectively prosecute criminal contempt motions for violations of CPOs. *Ibid.* Based on that observation, "as well as the procedural scheme established for enforcing CPOs," the court concluded that "[the] considerations supporting a private right of action to seek a CPO apply equally to a private right of action to enforce the CPO through an intrafamily contempt proceeding." *Id.* at 1280 n.7.

The District of Columbia rules governing domestic violence proceedings thus provide that a "motion requesting that the court order a person to show cause why she/he should not be held in criminal contempt for violation of a temporary protection order or civil protection order may be filed by an individual, [OAG] or an attorney appointed by the Court for that purpose." D.C. Super. Ct. Domestic Violence Unit R. 12(d).

2. On March 27, 1999, petitioner argued with respondent, his girlfriend. J.A. 40. The argument escalated, and petitioner hit respondent several times in the face and chest. J.A. 42-46. Respondent sustained serious injuries as a result of the incident. J.A. 51, 76.

On March 29, 1999, respondent filed a petition for a CPO in the Family Division of the Superior Court of the

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[2] This brief will refer to this office as OAG.

District of Columbia. J.A. 11-17. She alleged that petitioner had assaulted her during the March 27 incident, and she requested an order prohibiting respondent from abusing, threatening, harassing, or contacting her. J.A. 12-13. The court issued a temporary protection order that day. Pet. App. A3. On April 26, 1999, the OAG entered an appearance on behalf of respondent. J.A. 18. Following a hearing, the court that day issued a CPO ordering petitioner to stay at least 100 feet away from respondent's person, home, and workplace, and prohibiting petitioner from assaulting, threatening, harassing, physically abusing, or contacting respondent. J.A. 20. The CPO stated that any failure to comply "is punishable as criminal contempt." J.A. 25 (capitalization and emphasis omitted).

3. At the same time that respondent pursued a CPO, the United States Attorney's Office for the District of Columbia (USAO) independently pursued criminal charges stemming from the March 27 incident. On March 29, 1999, petitioner was charged by complaint in the Criminal Division of the Superior Court of the District of Columbia. J.A. 9. While those charges were pending, on June 26, 1999 (and continuing into the early morning hours of June 27), petitioner violated the CPO by trying to get respondent to drop the criminal charges and by throwing drain-cleaning acid on her face. Pet. App. A4-A5; J.A. 76-77. The acid caused serious injuries, and respondent was taken to the hospital. *Ibid.*

The USAO did not amend the complaint to add any charges related to the June incident. On July 8, 1999, a grand jury indicted petitioner on one count of aggravated assault and two counts of assault with a dangerous weapon for the March incident. J.A. 26-27. On July 28, 1999, petitioner entered into a plea agreement with the

USAO to resolve the pending criminal charges. J.A. 28-30; see U.S. Petition-Stage Br. App 1a. The agreement was hand-written on a one-page standard plea agreement form that both the USAO and the OAG use in the Superior Court. Because the printed form is designed for use by both offices, it lists both the "United States" and the "District of Columbia" in the case caption. *Ibid.* It also includes a signature line at the bottom for an "Assistant U.S. Attorney or [an] Assistant Corporation Counsel." *Ibid.*

In this case, the Assistant United States Attorney (AUSA) handling the matter crossed out "District of Columbia" in the caption, so that it read only "United States vs. John Robertson." J.A. 28. The AUSA also crossed out "Assistant Corporation Counsel" in the signature line, so that it read only "Assistant U.S. Attorney." J.A. 30. The AUSA wrote at the top of the form: "In exchange for Mr. Robertson's plea of guilty to attempt[ed] aggravated assault, the gov't agrees to" dismiss the remaining charges and "[n]ot pursue any charges concerning an incident on 6-26-99." J.A. 28 (capitalization omitted). Petitioner, his counsel, and the AUSA signed the plea agreement. J.A. 30. The court accepted petitioner's plea, J.A. 30, 46, and sentenced petitioner to one to three years' imprisonment. J.A. 53.

4. On January 28, 2000, respondent, represented by OAG, filed a motion pursuant to Section 16-1005(f) in the Family Division of the Superior Court seeking to have petitioner adjudicated guilty of criminal contempt for violations of the CPO. J.A. 59. The motion was captioned as *Watson* v. *Robertson*, IF No. 785-99, the same name and case number as respondent's initial petition for a CPO. J.A. 11, 59. Respondent also filed an affidavit alleging five specific actions by respondent that vio-

lated the CPO, J.A. 56-57, and a separate motion to modify and extend the CPO, J.A. 61-62. The violations alleged arose out of the June 26 incident. J.A. 56-57.

On May 10-11, 2000, the court held a bench trial to adjudicate the criminal contempt charges and to resolve the motion to modify and extend the CPO. J.A. 2, Pet. App. A5. The court found petitioner guilty on three counts of criminal contempt. J.A. 2, 63. The court entered a Judgment and Commitment/Probation Order, sentencing petitioner to three consecutive 180-day terms of imprisonment, but suspending execution of one of those terms and instead imposing five years of probation. J.A. 63-65. The court also ordered petitioner to pay approximately $10,000 in restitution for medical expenses that respondent incurred as a result of the assault. J.A. 64. Although the pleadings in the case were styled *Watson* v. *Robertson*, see, *e.g.*, J.A. 59, the form Judgment listed both the United States of America and the District of Columbia (but not respondent) as plaintiffs, and petitioner as defendant. J.A. 63. Petitioner appealed from the judgment of criminal contempt under the caption *Robertson* v. *Watson*. J.A. 3, 4.

5. a. More than three years later (while his direct appeal was still pending), in November 2003, petitioner moved the Superior Court pursuant to D.C. Code § 23-110 (2001) to vacate his criminal contempt convictions. Pet. App. A6; J.A. 3. In that motion, petitioner contended for the first time that the contempt proceeding had violated his plea agreement with the USAO and that his counsel had been ineffective in failing to raise that claim. Pet. App. A6-A7. On August 27, 2004, the trial court denied petitioner's motion to vacate. J.A. 89-93. Petitioner appealed from that order, and the appeal was consolidated with the pending direct appeal from his

criminal contempt convictions (in which he had not made a claim pertaining to his plea agreement). J.A. 4.

b. The court of appeals affirmed. Pet. App. A1-A25. Relying on its earlier precedent, the court read Section 16-1005(f) to confer "a private right of action" on the holder of a CPO "to enforce the CPO through an intrafamily contempt proceeding." *Id.* at A13 (quoting *Green*, 642 A.2d at 1280 n.7). The court rejected petitioner's submission that the contempt proceeding could "only be brought in the name of the relevant sovereign, the United States." *Id.* at A15 (internal quotation marks and ellipsis omitted). The court reasoned that conferring such a private right of action "does not contravene the general principle that criminal prosecutions are prosecuted in the name of the sovereign," because of "the special nature of criminal contempt." *Ibid.* Unlike other criminal prosecutions, the court explained, criminal contempt enforces judicial orders rather than general criminal laws. *Ibid.*

The court further held that petitioner's plea agreement did not bar the contempt proceeding because that agreement bound only the USAO—not respondent or OAG. Pet. App. A19-A20. In light of the handwritten changes to the plea agreement form, the court found, "no objectively reasonable person could understand that [petitioner's] plea agreement bound [respondent] * * * [or] the District." *Id.* at A20. The court added that D.C. Code § 16-1002(c) (2001), which provided that "[t]he institution of criminal charges by the United States attorney shall be in addition to, and shall not affect the rights of the complainant to seek any other relief under this subchapter," confirmed the absence of a bar on respondent's action. *Ibid.*; see Pet. App. A20 n.7.

SUMMARY OF ARGUMENT

The Constitution presupposes that the real party in interest in any criminal prosecution is the sovereign. That principle, however, is of no help to petitioner in this case because nothing in the Constitution requires that a criminal contempt be prosecuted *in the name of* the sovereign. And, equally important, nothing in petitioner's plea agreement with the United States Attorney's Office barred an intrafamily contempt proceeding initiated by respondent. Accordingly, the judgment should be affirmed.

A. The Constitution's use of terms such as "crime," "offense," and "criminal prosecution" must be understood in light of their common law heritage. At common law, a crime was a public wrong, and the sovereign was "the proper prosecutor for every public offence." 4 William Blackstone, *Commentaries* *2. Although England relied on a system of largely private prosecution in its criminal proceedings, private prosecutors were understood to be acting on behalf of the King. The American colonies and States moved away from England's practice of private prosecution and toward the concentration of prosecutorial authority in the hands of public officials, who by definition exercise governmental power. Even where privately conducted criminal proceedings continued to exist, the sovereign was understood to be the real party in all criminal prosecutions.

Consistent with the historical understanding of criminal prosecution as an exercise of sovereign authority, this Court's criminal procedure jurisprudence presupposes that the party adverse to the criminal defendant represents the government. This Court has marked the commencement of a criminal case, for purposes of the Sixth Amendment right to counsel, as "the point at

which the government has committed itself to prosecute." *Rothgery* v. *Gillespie County*, 128 S. Ct. 2578, 2583 (2008) (internal quotation marks and citation omitted). And the obligations that the Court has held the Due Process Clause to impose on prosecutors as critical to a defendant's right to a fair trial—including the requirement that the prosecutor provide defendants with material exculpatory evidence, see *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963)—could be effective only if prosecutors were understood to be exercising sovereign power (because the Due Process Clause has no application to private action).

The foundational premise that the prosecution of criminal offenses is an exercise of sovereign power holds true in criminal contempt proceedings. The Court, to be sure, has called contempt "an offense *sui generis*" and has interpreted the Constitution to permit greater procedural flexibility in contempt proceedings than in other criminal cases. *Cheff* v. *Schnackenberg*, 384 U.S. 373, 380 (1966). But the Court also has called contempt "a crime in the ordinary sense," *Bloom* v. *Illinois*, 391 U.S. 194, 201 (1968), and, in the context of a federal court contempt, has held that "[t]he fact that the allegedly criminal conduct concerns the violation of a court order instead of common law or a statutory prohibition does not render the prosecution any less an exercise of the sovereign power of the United States." *United States* v. *Providence Journal Co.*, 485 U.S. 693, 700 (1988). The Court's understanding of the nature of criminal contempt is consistent with its treatment at common law as a public offense whose prosecution was an exercise of sovereign power.

Yet the Constitution does not require that a prosecution for criminal contempt be brought in the name of the

government (as contrasted to being deemed an exercise of sovereign power). This Court has made clear that "[h]ow a case is captioned is of no significance" when determining whom the parties in a criminal contempt proceeding must be understood to represent. *Providence Journal*, 485 U.S. at 708 n.11. Likewise, at common law no consistent practice governed case captions in criminal contempt proceedings. Although captioning all criminal contempt proceedings in the name of the relevant sovereign would promote transparency, there is no constitutional requirement that this occur.

B. The exercise of the sovereign's prosecutorial authority by private individuals may raise constitutional questions, but none is presented in this case. Although a legislatively created right of criminal prosecution by private individuals in Article III courts would raise serious separation of powers concerns, it does not in District of Columbia courts because of the District's unique status. The Constitution grants broad authority over the District to Congress. U.S. Const. Art. I, § 8, Cl. 17. Accordingly, the provisions Congress adopts for the government of the District are not subject to the same separation of powers constraints that limit its powers at the national level. See *Palmore* v. *United States*, 411 U.S. 389, 397 (1973). Congress may therefore delegate prosecutorial powers in the District to individuals outside the Executive Branch, including employees of the congressionally created D.C. government or private individuals. In neither case does the delegation infringe on the constitutional prerogatives of the Executive Branch.

Private prosecutions by interested parties (such as respondent) also have the potential to raise due process questions. In *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), the Court relied on its

supervisory authority over Article III courts to hold that "counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order." *Id.* at 809. Since *Young*, state courts have divided on whether the Due Process Clause includes a similar prohibition. Petitioner, however, has expressly disavowed this claim, so it is not before the Court. Likewise, petitioner did not argue below that his criminal prosecution by respondent violated due process because respondent was insufficiently controlled or supervised by a public official. As a result, the record before the Court includes no explanation from the court of appeals on what authority (if any) D.C. judges have to terminate or otherwise oversee privately conducted intrafamily contempt proceedings in the District. Neither does it include any analysis from that court of the significance of respondent's representation by OAG attorneys.

C. The one argument that petitioner did belatedly press below was that his plea agreement barred the criminal contempt prosecution. The court of appeals correctly rejected that claim. A plea agreement made by one United States Attorney's Office does not normally bind any other agency or entity acting on behalf of the United States. Petitioner's plea agreement, by its terms, binds only the United States Attorney's Office for the District of Columbia, and respondent is not part of that office.

That conclusion is reinforced by a D.C. statute providing that criminal charges pursued by the Office of the United States Attorney "shall not affect the rights of [a protective order recipient] to seek any other relief" under D.C. law. D.C. Code § 16-1002(c) (2001). At the time of petitioner's plea, the D.C. Court of Appeals had

identified the right to bring criminal contempt actions as an available form of "relief" for private beneficiaries of protective orders. Petitioner was thus on notice as a matter of D.C. law that his agreement with the Office of the United States Attorney would not bar a privately initiated criminal contempt proceeding.

ARGUMENT

THE PROSECUTION OF PETITIONER WAS AN EXERCISE OF SOVEREIGN POWER, BUT HE IS NOT ENTITLED TO RELIEF UNDER THE CONSTITUTION OR HIS PLEA AGREEMENT

A. All Criminal Prosecutions, Including For Contempt, Must Be Understood As Exercises of Sovereign Power Although They Need Not Be Styled As Such

Both the common law background of the Constitution and assumptions embedded in this Court's criminal procedure decisions lead to the conclusion that criminal prosecutions must be understood as exercises of sovereign power. Although criminal contempt proceedings are for some purposes *sui generis* and thus permit procedural flexibility unavailable in regular criminal cases, prosecution of criminal contempt (whether or not conducted by a government employee) must also be understood as an exercise of sovereign power.[3] Nonetheless,

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[3] As the government argued in its petition-stage brief (Br. 9), we do not believe this Court's precedents directly control the question presented in this case. In light of the absence of direct authority from this Court and the D.C. Court of Appeals' binding local precedent in *Green* v. *Green*, 642 A.2d 1275, 1280 n.7 (1994), which granted recipients of CPOs a "private right of action" to pursue criminal contempt charges, the United States took the position below that "criminal contempt prosecutions under § 16-1005(f) may lawfully be conducted as private actions." Gov't. C.A. Br. 9. Although the United States no longer be-

the Constitution does not require that they be captioned as such.

1. Crime is a breach of public norms, and its prosecution is a sovereign function

As this Court has explained, the "purpose of a criminal court is not to provide a forum for the ascertainment of private rights. Rather it is to vindicate the public interest in the enforcement of the criminal law while at the same time safeguarding the rights of the individual defendant." *Standefer* v. *United States*, 447 U.S. 10, 25 (1980) (quoting *United States* v. *Standefer*, 610 F.2d 1076, 1093 (3d Cir. 1979) (en banc)). Both elements of the Court's observation about criminal proceedings—the traditional understanding that they vindicate the public interest and the need to ensure that they safeguard defendants' rights—presuppose that prosecution is an inherently sovereign function.

a. The Constitution makes a number of references to "crimes," "offence[s]," and "criminal prosecutions." See Pet. Br. at 14 n.9. Although the Constitution itself does not define these terms, their meaning is illuminated by common law traditions at the time the Constitution was drafted and ratified. See *Crawford* v. *Washington*, 541 U.S. 36, 42-50 (2004) (interpreting constitutional provisions in light of common law understandings and assumptions).[4]

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lieves the contempt prosecution at issue can be understood as a purely "private action[]," its ultimate position is the same now as it was before: Petitioner is not entitled to relief on his claim that the plea agreement barred his prosecution. Compare *id.* at 26-36 with Section C, *infra*.

[4] Respondent contends that the Constitution's terms capture only the "indispensable" components of the common law. Resp. Br. 19-20 (quoting *Williams* v. *Florida*, 399 U.S. 78, 100 (1970)). As shown below,

As petitioner demonstrates (Br. 14-35), the Constitution's common-law background suggests that the Framers understood a "crime" as an injury to the public, and a criminal prosecution as a response taken on the public's behalf. See, *e.g.*, 4 William Blackstone, *Commentaries* *2 (the sovereign is "in all cases the proper prosecutor for every public offence"). According to Blackstone, crimes, or public wrongs, are distinguished from civil actions, or private wrongs, in that civil injuries "are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals" while crimes "are a breach and violation of the public rights and duties due to the whole community, considered as a community." *Id.* at *5.

Thus, even though England had a long history of privately initiated criminal prosecution, see Resp. Br. 40, those privately conducted actions were understood as exercises of the King's power. That is shown by the authority of the attorney general of England (who initiated his own prosecutions only "in cases of special importance to the Crown") to file "a writ of *nolle prosequi*" to dismiss any privately initiated prosecution. Abraham S. Goldstein, *Prosecution: History of the Public Prosecutor, in* 3 *Encyclopedia of Crime & Justice* 1242 (Joshua Dressler ed., 2d ed. 2002). "[H]is decisions in such matters were treated by the courts as entirely within his discretion." *Ibid.*

American practice began departing early from the English tradition of private prosecution in favor of a system of public prosecution conducted by public officials. In the federal system in particular, the idea that

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the principle that criminal prosecution represents the exercise of sovereign power was "indispensable" to the common law's understanding of crime as a public offense.

a criminal prosecution is an action on behalf of the public was reflected in the decision to give prosecutorial authority to public officials alone. In 1789, Congress granted to the district attorneys exclusive authority to "prosecute in such district all delinquents for crimes and offences, cognizable under the authority of the United States." Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 92. Accordingly, from the beginning of the federal judicial system, public officials—the Attorney General and the United States Attorneys (and their predecessors)—prosecuted federal crimes. See National Comm'n on Law Observance & Enforcement, *Report on Prosecution* 7-9 (1931).

The colonies and early states also largely abandoned the English tradition of private prosecution and instead put prosecutorial authority in the hands of public officials. *See* Roscoe Pound, *Criminal Justice in America* 108 (1930). To be sure, the trend was not complete at the time of independence; privately conducted prosecutions continued into the nineteenth century (and, in some very limited contexts, still exist). Resp. Br. 40-41. Throughout this period, however, prosecutions in the States were generally understood to be actions on behalf of the sovereign, whether or not they were conducted by one of the sovereign's employees. See Pet. Br. 19-20, 26 n.12; *Huntington* v. *Attrill*, 146 U.S. 657, 669 (1892) ("Crimes and offenses against the laws of any state can only be defined, prosecuted, and pardoned by the sovereign authority of that State.").[5]

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[5] See also *State* v. *Westbrook*, 181 S.E.2d 572, 583 (N.C. 1971) (the prosecuting attorney, whether public or private, "represents the state"), *vacated in part on other grounds*, 408 U.S. 939 (1972); *Cronan ex rel. State* v. *Cronan*, 774 A.2d 866, 877 (R.I. 2001) ("[A]ttorneys conducting private prosecutions stand in the shoes of the state."); Andrew

b. Much of the Court's criminal procedure jurisprudence rests on the premise that the criminal defendant is prosecuted by a state actor. For example, the Court has tied the attachment of the Sixth Amendment right to counsel to "the point at which 'the government has committed itself to prosecute,' 'the adverse positions of government and defendant have solidified,' and the accused 'finds himself faced with the prosecutorial forces of organized society.'" *Rothgery* v. *Gillespie County*, 128 S. Ct. 2578, 2583 (2008) (quoting *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion)).

Similarly, the Court's understanding of the due process protections available to criminal defendants reflects an understanding of the prosecutor as a state actor, fulfilling a "duty on the part of the government." *Kyles* v. *Whitley*, 514 U.S. 419, 433 (1995). The Court has interpreted the Due Process Clause to impose on prosecutors various obligations thought integral to the defendant's ability to receive a fair trial. See, *e.g.*, *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963) (prosecutor must disclose favorable material evidence to defendant); *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935) (prosecutor may not procure conviction through testimony he knows to be false). The Court has also recognized constraints on prosecutorial discretion flowing from due process principles. See *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) ("[T]he equal protection component of the Due Process Clause of the Fifth Amendment" prohibits prosecutors from making decisions based on "an unjustifiable standard such as race, religion, or other arbitrary

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Sidman, *The Outmoded Concept of Private Prosecution*, 25 Am. U. L. Rev. 754, 774 (1976) ("[T]he privately retained attorney becomes, in effect, a temporary public prosecutor.") (footnote omitted).

classification.") (internal quotation marks and citation omitted).

The Due Process Clause is a limitation on government authority; it does not apply to private actors acting on their own. *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974) (noting "the essential dichotomy" in the Due Process Clause "between deprivation by the State, subject to scrutiny under its provisions, and private conduct" against which it "offers no shield"). Accordingly, this Court's understanding of the Constitution's "basic 'fair trial' guarantee," *United States* v. *Ruiz*, 536 U.S. 622, 628 (2002), can be universally effective only if a criminal prosecutor—whether or not a government employee—is understood to be exercising governmental power.[6] Indeed, this Court has described the prosecutor as "a quintessential state actor." *Georgia* v. *McCollum*, 505 U.S. 42, 50 (1992).

2. Prosecution of criminal contempt is also an exercise of sovereign power

The government is the true party in interest in a prosecution for criminal contempt, just as it is for the prosecution of ordinary crimes. Criminal contempt has been described as *sui generis* for certain purposes, and the Constitution affords greater procedural flexibility in criminal contempt proceedings than it does in ordinary criminal cases. Nonetheless, prosecution of criminal contempt, just like prosecution for ordinary crimes, is an exercise of sovereign, not private, power.

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[6] When private individuals undertake an action, such as prosecution, that is "traditionally associated with sovereignty," they are deemed state actors exercising sovereign power and thus become subject to constitutional constraints. *Jackson*, 419 U.S. at 352-353.

a. In light of the unique function of contempt, this Court has declined to interpret the Constitution to require criminal contempt proceedings to be conducted in precisely the same way as ordinary criminal prosecutions. See *Cheff* v. *Schnackenberg*, 384 U.S. 373, 380 (1966) (describing criminal contempt as "an offense *sui generis*"); Resp. Br. 23-27. The purpose underlying criminal contempt—the vindication of the court's authority—is not co-extensive with the general purpose of substantive criminal statutes. See *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 804 (1987).

Principally because of that difference, the procedures governing prosecution of criminal contempt vary in several respects from the procedures used to prosecute ordinary crimes. For example, criminal contempt, unlike any other offense punishable by death or imprisonment in excess of one year, does not have to be prosecuted by an indictment. See *Green* v. *United States*, 356 U.S. 165, 184-185 (1958), overruled in part on other grounds by *Bloom* v. *Illinois*, 391 U.S. 194 (1968). In addition, contempts committed in the court's presence may be punished summarily, without the normal due process requirements applicable to ordinary crimes. *Pounders* v. *Watson*, 521 U.S. 982, 987-988 (1997) (per curiam); see Fed. R. Crim. P. 42(b).[7]

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[7] As respondent points out (Br. 23-26), this Court held prior to *Bloom*, 391 U.S. 194, that a contempt was not a "crime" for purposes of the Constitution's jury trial right. *Bloom*, however, questioned the historical basis for that now repudiated view. See 391 U.S. at 198 n.2. In any event, even the earlier cases finding no jury trial right did not question the fundamental premise that a criminal contempt proceeding involved an exercise of sovereign power.

b. Nonetheless, the Court has also described criminal contempt as a "crime in the ordinary sense," *Bloom*, 391 U.S. at 201, and has extended a variety of constitutional protections applicable in ordinary criminal cases to nonsummary criminal contempt proceedings. See *e.g.*, *United States* v. *Dixon*, 509 U.S. 688, 696 (1993) (double jeopardy); *Hicks ex rel. Feiock* v. *Feiock*, 485 U.S. 624, 632 (1988) (proof beyond a reasonable doubt); *Cooke* v. *United States*, 267 U.S. 517, 537 (1925) (notice of charges, assistance of counsel, and compulsory process); *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 444 (1911) (privilege against self-incrimination and presumption of innocence); see also *Bloom*, 391 U.S. at 201-202 (jury trial for nonpetty contempt).

As these holdings suggest, this Court has generally conceived of criminal contempts in the same essential way it has ordinary crimes—as offenses against the sovereign. See *e.g.*, *United States* v. *Providence Journal Co.*, 485 U.S. 693, 700 (1988) ("The fact that the allegedly criminal conduct concerns the violation of a court order instead of common law or a statutory prohibition does not render the prosecution any less an exercise of the sovereign power of the United States."); *Ex parte Grossman*, 267 U.S. 87, 115 (1925) (President could pardon individual convicted of criminal contempt because it was an "offense[] against the United States").

Indeed, the Court has often distinguished civil from criminal contempt by noting that criminal contempt is typically a separate public action brought on behalf of the government, while a civil contempt is generally a part of the original private suit. See *Gompers*, 221 U.S. at 445 (while civil contempts are "between the original parties," "proceedings at law for criminal contempt are between the public and the defendant"); *Bessette* v. *W.B.*

Conkey Co., 194 U.S. 324, 328 (1904) (private individuals are the "parties chiefly in interest" in civil contempt; "the government, the courts, and the people are interested in the[] prosecution" of criminal contempt, "and private parties have little, if any, interest" in such proceedings) (quoting *In re Nevitt*, 117 F. 448, 458 (8th Cir. 1902)).

The Court's understanding of the nature of criminal contempt is consistent with the status of criminal contempt at common law. See, *e.g.*, Ronald L. Goldfarb, *The Contempt Power* 58 (1963) ("Reference again to the historical nature of the contempt power indicates that in any event, contempt of any kind or classification could historically only be a governmental power to be used essentially for governmental purposes, any private aspects notwithstanding. This is incontrovertible fact and history."); Wilbur Larremore, *Constitutional Regulation of Contempt of Court*, 13 Harv. L. Rev. 615, 622 (1900) ("Contempt is, of course, a *public* offence, but it is a special kind of public offence. It is, like any infraction of law, an offence against the whole people, but, in addition and more important, it is an offence against the dignity and a defiance of the authority of the court.").[8]

The D.C. Court of Appeals in this case held that the criminal contempt prosecution was properly characterized as "a private right of action brought in the * * * interest of [respondent], not as a public action brought in the * * * interest of the United States or any other governmental entity." Pet. App. A15. It is not clear whether in making that statement the court of appeals

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[8] Indeed, the D.C. court rule that governed the intrafamily contempt proceedings at issue here describes criminal contempt as "a violation of the law, a public wrong which is punishable by fine or imprisonment or both." D.C. Super. Ct. Domestic Violence Unit R. 12(a).

was addressing the same question now before this Court. See Resp. Br. 43. Assuming it was, the court of appeals erred on this abstract question of characterization. The criminal contempt prosecution here, like any other, was an exercise of sovereign power. As explained below (Section C, *infra*), however, the D.C. Court of Appeals' failure to recognize the true character of the prosecution does not require reversal.

3. The Constitution does not require a criminal prosecution to be brought in the name of the sovereign

Although the sovereign is the real party in interest in any criminal contempt prosecution, the Constitution does not require that the case be brought in the government's "name." See Resp. Br. at 28-32. Proceeding in the name of the government promotes transparency and helps to ensure that the defendant receives adequate notice that the proceedings are criminal in nature. See *McCann* v. *New York Stock Exch.*, 80 F.2d 211, 214-215 (2d Cir. 1935), cert. denied, 299 U.S. 603 (1936); see also *Gompers*, 221 U.S. at 446.[9] The Constitution, however, is not concerned with technical rules governing pleading captions.

This Court's decision in *Providence Journal* confirms the immateriality of the way parties are listed in the case caption of a criminal contempt proceeding. There, the Court held that a privately conducted contempt prosecution in an Article III court was a case in which the United States was "interested" for purposes of a statutory requirement that the Solicitor General appear

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[9] The use of respondent's name in the case caption of this proceeding would not have misled petitioner into thinking it was civil. Respondent initiated the proceeding by filing a "Motion to Adjudicate *Criminal* Contempt." J.A. 59-60 (emphasis added).

(or authorize someone else to appear) in this Court in all such cases. 485 U.S. at 707-708; see note 1, *supra*. In reaching that conclusion, the Court noted that

> [h]ow a case is captioned is of no significance to our holding. As we have previously observed, "courts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented." Thus, even if the case had not been recaptioned by the special prosecutor upon the filing of a petition in this Court to reflect the "adversary nature of the proceeding," we would have been required to determine whether this was a case "in which the United States is interested." A criminal contempt prosecution in federal court, however styled, is such a case.

Id. at 708 n.11 (citations omitted).

Likewise, in determining whether a contempt is criminal, this Court has indicated that what matters is the "substance of the proceeding and the character of the relief," rather than the label that the state or the parties have placed on the action. *Feiock*, 485 U.S. at 631. The Court has treated the styling of the case as among the indicators of whether a contempt proceeding is at bottom criminal or civil, but not as a matter subject to constitutional requirements. See *id.* at 638-639; *Nye* v. *United States*, 313 U.S. 33, 42 (1941) ("While the proceedings in the District Court were entitled [as in the private action] and the United States was not a party until the appeal, those circumstances though relevant are not conclusive as to the nature of the contempt.") (citation omitted). The Court has thus reviewed criminal contempts under a variety of captions, including formulations that make no reference to any sovereign. See

Resp. Br. 30-31; see also *Gompers*, 221 U.S. at 446 (criminal contempt proceedings can be properly captioned "In re" followed by name of defendant).

The Court's focus on substance over form is consistent with the common law tradition, which yielded no consistent answer on how to style criminal contempt proceedings. At common law, "the better practice" was "to institute an independent action [for criminal contempt] in the name of the state" even when it was conducted by private counsel. James L. High, *A Treatise on the Law of Injunctions* § 1449, at 1460 (4th ed. 1905). But "it [was] not error to entitle the proceedings in the civil case." *Ibid.*; see Stewart Rapalje, *A Treatise on Contempt* § 95, at 124 (1890) ("The decisions upon [the] comparatively unimportant matter [of how to name criminal contempt proceedings] are not harmonious.").

B. Criminal Contempt Prosecutions By Private Parties On Behalf Of The Sovereign May Raise Constitutional Questions, But None Is Presented Here

To say that a prosecution for criminal contempt in a congressionally created court must be understood as an exercise of sovereign power (even if not taken in the sovereign's name) is not to end the inquiry. As this Court has recognized, private parties may "represent the United States" as criminal contempt prosecutors under certain circumstances. *Young*, 481 U.S. at 804. Thus, a prosecutor acting pursuant to the power of the sovereign does not in all cases have to be the sovereign's employee. When the prosecutor is not a public employee, however, separation of powers and due process questions can arise. Those constitutional concerns may well prevent a private person from representing the United States in

a criminal contempt proceeding. But they are not presented in this case.

1. Congress has plenary authority over the District of Columbia and thus may delegate prosecutorial authority there to individuals outside the Executive Branch

a. The Constitution "sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial." *Bowsher* v. *Synar*, 478 U.S. 714, 721 (1986) (quoting *INS* v. *Chadha*, 462 U.S. 919, 951 (1983)). A primary constitutional responsibility of the Executive Branch is to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3. That responsibility has long been understood to encompass the responsibility for initiating and prosecuting criminal cases. *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985); *Buckley* v. *Valeo*, 424 U.S. 1, 138 (1976) (per curiam); *United States* v. *Nixon*, 418 U.S. 683, 693 (1974).

In *Young*, however, the Court held that the prosecution of criminal contempt in Article III courts need not "be considered an execution of the criminal law in which only the Executive Branch may engage." 481 U.S. at 799-800. The Court based this conclusion on "the long-standing acknowledgment that the initiation of contempt proceedings to punish disobedience to court orders is a part of the judicial function" and on the Judiciary's "need for an independent means of self-protection." *Id.* at 795, 796.

If Congress by statute were to confer authority on private individuals or entities (outside the Executive or Judicial Branches) to prosecute contempts in Article III courts, neither the tradition of judicial control over con-

tempt proceedings nor the interest in judicial self-protection that the Court invoked in *Young* would be present. Such a novel scheme would thus raise serious separation of powers concerns.

b. Contrary to petitioner's contention (Br. 53-55), however, those concerns are not implicated in this case because of the unique constitutional status of the District of Columbia.

The Constitution authorizes Congress "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District * * * as may * * * become the Seat of the Government of the United States." U.S. Const. Art. I, § 8, Cl. 17. Acting pursuant to this authority, Congress may "exercise all the police and regulatory powers [in the District of Columbia] which a state legislature or municipal government would have in legislating for state or local purposes." *Palmore* v. *United States*, 411 U.S. 389, 397 (1973); see *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 619 (1838) ("Congress has the entire control over the [District of Columbia] for every purpose of government."); *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 76 (1982) (plurality opinion) ("Congress' power over the District of Columbia encompasses the *full* authority of government, and thus, necessarily, the *Executive* and Judicial powers as well as the Legislative.") (second emphasis added).

Congress delegated a portion of its plenary authority over the District to the D.C. government. See District of Columbia Home Rule Act (D.C. Home Rule Act), Pub. L. No. 93-198, 87 Stat. 774. As part of that delegation, Congress provided that "the legislative power granted to the District by this Act is vested in and shall be exercised by the [D.C.] Council," *Id.* § 404(a), 87 Stat. 787;

see D.C. Code § 1-227 (1992). When the D.C. Council acts "within that authority" delegated by Congress, this Court analyzes the constitutional limits on that action "as if that act * * * had been passed directly by Congress" in its administration of District affairs. *Welch* v. *Cook*, 97 U.S. 541, 542 (1879).

Accordingly, decisions made by the D.C. Council within the scope of its delegated authority are treated as exercises of Congress's "entire control" over the District for constitutional purposes. *Kendall*, 37 U.S. (12 Pet.) at 619.[10] In this case, the D.C. Court of Appeals in *Green* understood the Council to have granted private individuals the power to prosecute intrafamily contempts in District of Columbia courts. In other instances, Congress

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[10] Congress has granted the D.C. Office of Attorney General the power to conduct certain prosecutions, while specifying that "[a]ll other criminal prosecutions shall be conducted in the name of the United States by the United States attorney for the District of Columbia or his assistants, except as otherwise provided by law." See District of Columbia Court Reorganization Act of 1970, Pub. L. No. 91-358, § 210(a), 84 Stat. 605 (D.C. Code § 23-101(c) (2001)); see also D.C. Home Rule Act, § 602(a)(8), 87 Stat. 813 (D.C. Code § 1-206.02(a)(8) (2001)) (D.C. Council may not "enact any act or regulation relating to * * * the duties or powers of the United States Attorney * * * for the District of Columbia."). Petitioner did not argue below and does not argue now that the D.C. Council's decision (as inferred by the D.C. Court of Appeals in *Green*) to permit private individuals to prosecute intrafamily contempts was in excess of the Council's delegated authority as established by these statutes. See Pet. Br. 55-56 n.23. Nor did petitioner argue below that permitting private parties to prosecute in the District violates a D.C.-specific principle of separation of powers derived from the Congressional home rule statutes. See *ibid.*; see also *Whalen* v. *United States*, 445 U.S. 684, 687 (1980) (This Court typically defers to D.C. Court of Appeals on "matters of exclusively local concern," including the meaning of "Acts of Congress applicable only within the District of Columbia.").

itself has expressly delegated prosecutorial authority to the D.C. Office of Attorney General. See, *e.g.*, D.C. Code § 23-101(a) (2001). Neither the private contempt prosecutors nor the attorneys in OAG are federal Executive Branch officials. But that is immaterial because both exercise a portion of *Congress*'s "Executive * * * powers" in the District. *Northern Pipeline*, 458 U.S. at 76 (plurality opinion). In short, the location of this case removes any separation of powers issue.

2. Petitioner has not preserved a due process challenge based on respondent's personal interest or the absence of public control over her actions

In *Young*, the Court relied on its supervisory authority over Article III courts to hold that "counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order." 481 U.S. at 809. Justice Blackmun would have gone "further" and held that "the practice—federal or state—of appointing an interested party's counsel to prosecute for criminal contempt is a violation of due process." *Id.* at 814-815 (Blackmun, J., concurring).

Since *Young*, state courts have reached different conclusions on the question whether there is a due process right to a disinterested prosecutor. Compare, *e.g.*, *Wilson* v. *Wilson*, 984 S.W.2d 898, 903-904 (Tenn. 1998) ("We hold that Due Process does not mandate adoption of a rule which automatically disqualifies a litigant's private counsel from prosecuting a contempt action."), cert. denied, 528 U.S. 822 (1999), with, *e.g.*, *People* v. *Calderone*, 573 N.Y.S.2d 1005, 1007 (N.Y. City Crim. Ct. 1991) ("[P]rivate prosecutions by interested parties or their

attorneys present inherent conflicts of interest which violate defendants' due process rights.").

Petitioner does not raise this due process claim in his brief, however, and he has affirmatively disavowed it previously.[11] It is accordingly not before the Court.

Likewise, petitioner never argued below that the D.C. scheme violated due process because of an absence of effective governmental control over the private prosecutor. See generally Patricia Moran, *Private Prosecutors in Criminal Contempt Actions Under Rule 42(b) of the Federal Rules of Criminal Procedure*, 54 Fordham L. Rev. 1141, 1152-1155 (1986) (States that permit private participation in criminal prosecutions typically require some degree of oversight by the district attorney). Indeed, petitioner "never has challenged the *Green* court's holding" that the private party or his lawyer "can stand in the courtroom well and physically prosecute [Section] § 16-1005(f) actions." Pet. 17 n.13. Petitioner's entire argument has rested on how his contempt prosecution should be *characterized*, not on how it was actually conducted.

In his merits brief, petitioner for the first time suggests that "because the government was entirely uninvolved in conducting the prosecution, the manner of prosecution raises due process concerns as well." Pet. Br. 51. Respondent counters that, to the extent some degree of governmental supervision over a private prosecutor is constitutionally required, it was provided here by the superior court, which "exercised substantial control over the proceeding." Resp. Br. 60-61. In addition,

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[11] See, *e.g.*, Pet. C.A. Reply Br. 4 & n.3 ("[Petitioner] in no way challenges the *Green* holding" that "interested CPO holders can serve as private prosecutors in [Section] § 16-1005(f) criminal contempt actions."); see also Resp. Br. 62 (citing additional examples).

the government was not "entirely uninvolved" in the prosecution (Pet. Br. 51); attorneys from OAG represented respondent.

This Court does not typically decide questions that were neither raised nor passed on below. See *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 213 (1998); *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."). It would be particularly inappropriate to do so in this case because petitioner's waiver of this claim means that the D.C. Court of Appeals never had an opportunity to answer key questions about the nature and degree of judicial and OAG oversight over private contempt prosecutors in the District.

C. The Criminal Contempt Prosecution Did Not Violate Petitioner's Plea Agreement With The United States Attorney's Office

The D.C. Court of Appeals' affirmance of petitioner's contempt conviction was correct, notwithstanding its apparent failure to recognize that his prosecution, like all those in congressionally created courts, was conducted pursuant to the power of the United States. Indeed, it was not necessary for the court of appeals to characterize the prosecution (as either governmental or private) to resolve the only claim petitioner raised below, which was that his plea agreement barred the contempt prosecution. That claims fails regardless because the agreement bound only the Office of the United States Attorney for the District of Columbia, not any

other individual or entity, including respondent, exercising governmental power.[12]

As the D.C. Court of Appeals stated, a "plea agreement is a contract," and "[a]s a consequence, courts will look to principles of contract law to determine whether the plea agreement has been breached." Pet. App. A19 (quoting *United States* v. *Jones*, 58 F.3d 688, 691 (D.C. Cir.), cert. denied, 516 U.S. 970 (1995)).

The plea agreement in this case was solely between petitioner and the United States Attorney's Office for the District of Columbia. The AUSA handling petitioner's case crossed out "District of Columbia" in the caption of the agreement, so that it read only "United States vs. John Robertson." J.A. 28. The AUSA also crossed out "Assistant Corporation Counsel" in the signature line, so that it read only "Assistant U.S. Attorney." J.A. 30. The AUSA then wrote at the top of the form: "In exchange for Mr. Robertson's plea of guilty to Attempt[ed] Aggravated assault, the gov't agrees to" dismiss the remaining charges and "[n]ot pursue any charges concerning an incident on 6-26-99." J.A. 28.

In the context of this plea agreement, the word "gov't" referred only to the Office of the United States Attorney for the District of Columbia. The standardized plea agreement could be used to bind two entities—the United States Attorney's Office for the District of Columbia, the Office of the D.C. Attorney General, or both. By crossing out "the District of Columbia" and "Assistant Corporation Counsel," the AUSA made clear that the plea agreement with petitioner covered only the United States Attorney's Office. Indeed, "within the

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[12] As the government noted in its amicus brief at the petition stage (at 18-19), petitioner's claim is subject to particularly stringent review because he did not properly preserve it in the Superior Court.

criminal justice system throughout the country, the term 'the government' is widely used and understood to refer to the 'prosecution' or 'the United States Attorney.'" *United States* v. *Rourke*, 74 F.3d 802, 807 (7th Cir.), cert. denied, 517 U.S. 1215 (1996).

A plea agreement made by one United States Attorney's Office does not normally bind any other agency or entity acting on behalf of the United States. See, *e.g.*, *United States* v. *Camacho-Bordes*, 94 F.3d 1168, 1175 (8th Cir. 1996) (plea agreement by United States Attorney, on behalf of "the Government," did not bind the INS); *United States* v. *Annabi*, 771 F.2d 670, 672 (2d Cir. 1985) (per curiam) (plea agreement by one United States Attorney's Office, on behalf of "the Government," did not bind another United States Attorney's Office, "unless it affirmatively appears that the agreement contemplates a broader restriction").

When other courts have interpreted plea agreements with one United States Attorney's Office to cover other such offices, they have done so because no language in the agreement at issue indicated that it was intended to be limited. See *United States* v. *Gebbie*, 294 F.3d 540, 550 (3d Cir. 2002); *United States* v. *Harvey*, 791 F.2d 294, 301-302 (4th Cir. 1986). Even under that approach, petitioner's claim would fail given that the agreement here evinces an intent to limit its scope to the United States Attorney's Office for the District of Columbia. The plea agreement could not reasonably be construed to cover a contempt prosecution by a private person—even one understood to be acting on behalf of the government—because she was not part of that office.

If any doubt remained on this question, it would be settled by D.C. Code § 16-1002(c) (2001). See Pet. App. A20 n.7. At the time petitioner signed his plea agree-

ment, Section 16-1002(c) provided that "[t]he institution of criminal charges by the United States attorney shall be in addition to, and shall not affect the rights of the complainant to seek any other relief under this subchapter."[13] The D.C. Court of Appeals in *Green* had held that one form of "relief under this subchapter" was the right to initiate criminal contempt proceedings for CPO violations. Petitioner was thus on notice that his plea agreement with the United States Attorney's Office could not bar the subsequent contempt prosecution initiated by respondent.

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[13] Section 16-1002(c) was subsequently amended and now provides in pertinent part: "A petitioner has a right to seek relief under this subchapter. This right does not depend on the decision of the Attorney General, the United States Attorney for the District of Columbia, or a prosecuting attorney in any jurisdiction to initiate or not to initiate a criminal or delinquency case or on the pendency or termination of a criminal or delinquency case involving the same parties or issues." D.C. Code § 16-2002 (Supp. 2009).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 2010

AMICUS CURIAE BRIEF

No. 08-6261

IN THE

Supreme Court of the United States

JOHN ROBERTSON, *Petitioner*,

v.

WYKENNA WATSON, *Respondent*.

On Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF FOR THE DISTRICT OF COLUMBIA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether an action for criminal contempt in a congressionally created court may constitutionally be brought in the name and pursuant to the power of a private person, rather than in the name and pursuant to the power of the United States.

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INTEREST OF AMICUS CURIAE

This case involves the constitutionality of statutes allowing the issuance of civil protection orders and enforcement through contempt proceedings. Congress originally enacted the statutory scheme at issue in its capacity as the supreme legislature for the District of Columbia. The Council of the District of Columbia later amended certain provisions, and the District of Columbia Court of Appeals interpreted that legislature's intent in the decision at issue. The local government of the District of Columbia has an interest in defending its local statutes and the authoritative interpretation of the highest local court, under which private parties may enforce the civil protection orders they obtain by prosecuting violators for criminal contempt.

The District of Columbia also has related interests in preventing domestic violence and in ensuring that court orders are obeyed. Petitioner's argument if accepted would limit how civil protection orders issued by local courts to prevent domestic violence may be enforced and, in some instances, whether they may be enforced effectively at all.

Petitioner's argument that the local legislature may not allow a private party to pursue criminal contempt in her own name also touches on the extent to which local officials, especially those accountable to the local populace, may make local governmental decisions under authority delegated by Congress. Home rule is of surpassing importance to the people of the District of Columbia and to their local government.

The District of Columbia supports respondent Wykenna Watson as amicus curiae. The Office of

the Attorney General for the District of Columbia represented her earlier in this case, as authorized by local court rule and statute. Super. Ct. Intrafamily R. 9(a)(2) (1987); D.C. Code § 16-1003(c) (1989 repl.); *see* D.C. Code § 16-1003(b) (2009 supp.). That office no longer represents her before this Court but continues to represent other individuals who similarly seek to obtain civil protection orders and enforce them in the District's local courts.

STATEMENT

1. Forty years ago, Congress made the District of Columbia (District) the first jurisdiction in the nation with a system for victims of domestic violence to obtain civil protection orders (CPOs). District of Columbia Court Reform and Criminal Procedure Act of 1970 (Court Reform Act), Pub. L. No. 91-358, § 131, 84 Stat. 473, 545–48; Jeffrey R. Baker, *Enjoining Coercion: Squaring Civil Protection Orders with the Reality of Domestic Abuse*, 11 J.L. & Fam. Stud. 35, 38 (2008). Every state has since followed suit. *Id.*

As enacted by Congress, the scheme had two essential components. First, on a petition by the District's Corporation Counsel (now known as the Attorney General), the Superior Court of the District of Columbia could enter a temporary protection order or a CPO lasting up to a year when an "intrafamily offense" had been "committed or threatened." 84 Stat. at 546–47; D.C. Code §§ 16-1001(1), 16-1003, 16-1004, 16-1005 (1973). Such an order could direct the respondent "to refrain from the conduct committed or threatened and to keep the peace toward the family member," among other things. 84 Stat. at 547; D.C. Code § 16-1005(c) (1973).

Second, to ensure that CPOs were effective, Congress specified that "[v]iolation of any temporary or permanent order issued under this chapter . . . shall be punishable as contempt." 84 Stat. at 548; D.C. Code § 16-1005(f) (1973). Congress envisioned these procedures as "an alternative to criminal prosecution, which is often inappropriate in the resolution of family disputes, and to no official process at all." H.R. Rep. No. 91-907, at 161 (1970).

The Superior Court adopted Intrafamily Rules soon after Congress created the CPO scheme in 1970. Under these rules, the court could initiate contempt proceedings on a motion alleging violations of a CPO. Super. Ct. Intrafamily R. 9(c) (1971). The rules established that contempt "shall be punishable by a fine or penalty of not more than $300 or by imprisonment for not more than six months." *Id.* 9(d).

In 1973, Congress enacted the District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act), Pub. L. No. 93-198, 87 Stat. 774 (1973). The "paramount purpose" of the Home Rule Act was to "grant to the inhabitants of the District of Columbia powers of local self-government." *Bergman v. District of Columbia*, 986 A.2d 1208, 1226 (D.C. 2010) (quoting D.C. Code § 1-201.02(a) (2006 repl.)). Among other fundamental steps taken to promote that purpose, Congress created the Council of the District of Columbia (Council) and delegated it broad legislative authority. D.C. Code §§ 1-203.02, 1-204.01, 1-204.04 (2006 repl.). With certain carefully enumerated limitations, the Council has "legislative power" that "extend[s] to all rightful subjects of legislation within the District

consistent with the Constitution of the United States." *Id.*

The Council has in the ensuing decades repeatedly strengthened the CPO system Congress initially created. In particular, it has emphasized the independent right of victims of domestic violence to seek judicial assistance themselves.

In 1982, the Council authorized victims of domestic violence to seek CPOs on their own initiative. D.C. Law 4-144, 29 D.C. Reg. 3131 (1982); D.C. Code § 16-1003(a) (1989 repl.). It saw that "[v]iolence among family members [was] a growing national problem as well as a local phenomenon." Report of the Council of the District of Columbia Committee on the Judiciary on Bill 4-195, at 1 (May 12, 1982). The Council created "a private right of action" in order "(1) to promote a prompt resolution of an intrafamily offense problem; and (2) to facilitate the effectiveness of the civil protection remedy by not requiring all alleged victims to go through the already heavily burdened Office of the Corporation Counsel." *Id.* at 10. That office, which Congress in 1970 had made the sole entity authorized to petition the Superior Court for CPOs, "was unable to meet the demand for the growing number of CPOs." *Id.* at 2; *Green v. Green*, 642 A.2d 1275, 1279 n.7 (D.C. 1994). The creation of a private right of action was thus appropriate to supplement "[e]xisting remedies" that were "inadequate in aiding victims in preventing further abuse." Report on Bill 4-195, at 2, 10. The Council also recognized that a party exercising this private right of action might act independently of any government prosecution: "The institution of criminal charges by the United States Attorney shall

be in addition to, and shall not affect the rights of the complainant to seek any other relief under this chapter." D.C. Code § 16-1002(c) (1989 repl.).

The Superior Court revised its rules after the Council established a private right of action. These revised rules made clear that the party that sought the CPO in the first instance could pursue enforcement through contempt. Super. Ct. Intrafamily R. 7(c), 12(c)(2), (4) (1987) (allowing motions for contempt, giving "[b]oth parties . . . the right to present sworn testimony of witnesses and other evidence in support of or in opposition to the motion" for contempt, and allowing the court to seek representation for the petitioner); *see id.* 9(a) (discussing representation of petitioners). Consistent with these rules and the Council's creation of a private right of action, the Superior Court recognized in 1989 that a private party could herself initiate and prosecute a criminal contempt action for violation of a CPO. *Castellanos v. Novoa*, 117 Wash. L. Rep. 1189 (D.C. Super. Ct. 1989).

The Council in later years continued to reinforce and expand the protections afforded under the CPO system. In 1990, the Council saw that, despite its efforts, domestic violence was "steadily increasing in the United States and the District of Columbia." Report of the Council of the District of Columbia Committee on the Judiciary on Bill 8-192, at 2 (May 16, 1990). One problem was that police officers treated domestic violence differently from other violent crimes and were "reluctant to intervene beyond mediation/conflict resolution and referral." *Id.* Based on studies showing "that mandatory arrest laws and regulations are the most effective deterrent

to domestic violence," the Council enacted a provision requiring arrest by an officer with probable cause to believe an intrafamily offense had occurred. *Id.* at 2–3; D.C. Law 8-261, 37 D.C. Reg. 5001 (1990); D.C. Code § 16-1031 (1997 repl.).

In 1994, the District of Columbia Court of Appeals rejected the argument that a criminal contemnor had "a 'fundamental' constitutional right to a public prosecutor" that was violated "when the trial judge permitted [the CPO holder's] counsel to participate in the intrafamily contempt proceedings." *Green*, 642 A.2d at 1278, 1280–81. Based on the Council's decision in 1982 to allow individuals themselves to petition for CPOs and the recognition that government lawyers lacked the resources to take all necessary actions to protect such individuals, the court held that the statutes permitted "the beneficiary of a CPO . . . to enforce that order through an intrafamily contempt proceeding." *Id.* at 1279 & n.7; *see also id.* at 1278 (citing relevant court rules).

Later in 1994, the Council expanded the class of intrafamily offenses subject to the CPO scheme. With "domestic violence continu[ing] to be one of the most formidable social and legal problems at both the local and national levels," the Council recognized that "victims of domestic violence in a significant social relationship" deserve protection even "if they are not actually living with their attacker." Report of the Council of the District of Columbia Committee on the Judiciary on Bill 10-477, at 1–2, 3 (Oct. 12, 1994). The Council thus included within the definition of "intrafamily offense" those criminal offenses committed against one "with whom the offender maintains or maintained a romantic relationship."

D.C. Law 10-237, 42 D.C. Reg. 36 (1994); D.C. Code § 16-1001(5)(B) (1997 repl.). The Council also added, as a companion to the existing contempt provision, a provision making the violation of a CPO "a misdemeanor . . . punish[able] by a fine not exceeding $1,000 or by imprisonment for not more than 180 days, or both." D.C. Code § 16-1005(g) (1997 repl.); *see* Report on Bill 10-477, at 2, 5.

In 1996, the Superior Court created a dedicated Domestic Violence Unit. *Robinson v. United States* 769 A.2d 747, 750–54 (D.C. 2001). That unit adopted new rules in 2000 similar to the Superior Court's earlier Intrafamily Rules. These rules continue to recognize the rights of those seeking CPOs to secure private representation and to move in their private capacity for criminal contempt when CPOs are violated. Super. Ct. Domestic Violence R. 7(e), 9(a), 12(d), (e) (2000); *see id.* 8(b) (referring to "privately prosecuted criminal contempt actions").

In 2002, the Council further strengthened the enforcement of CPOs. It joined other jurisdictions that had adopted a "uniform mechanism for the interstate enforcement of domestic violence protection orders." Report of the Council of the District of Columbia Committee on the Judiciary on Bill 14-212, at 1 (Oct. 29, 2002); D.C. Law 14-296, 50 D.C. Reg. 320 (2002); D.C. Code §§ 16-1041 to 16-1048 (2009 supp.). It amended existing law to include the violation of "foreign protection order[s]" as cause for seeking contempt. D.C. Code § 16-1005(f), (g) (2009 supp.). It also guaranteed that the District's enforcement mechanisms generally would be available to those holding orders from other jurisdictions, and further that contempt enforcement of foreign orders

was permissible even where the foreign jurisdiction's own courts would "not recognize the standing of a protected individual to seek enforcement." D.C. Code § 16-1042(a), (b) (2009 supp.).

In later years, the Council continued taking steps to improve the District's legislative response to domestic violence. D.C. Law 16-306, § 206, 53 D.C. Reg. 8610, 8626 (2006); D.C. Law 16-204, 53 D.C. Reg. 9059 (2006). Most recently, in 2008, the Council revised the law to close certain "loopholes" and establish that minors too could seek CPOs. Report of the Council of the District of Columbia Committee on the Judiciary on Bill 17-55, at 1–2 (Nov. 25, 2008); D.C. Law 17-368, 56 D.C. Reg. 1338 (2008); D.C. Code §§ 16-1001 to 16-1006 (2009 supp.). The Council did not amend the provision relating to enforcement by contempt but did recognize, with apparent approval, the decision under review in this case: "The Court affirmed that private petitioners may bring contempt cases for CPO violations." Report on Bill 17-55, at 4.

2. In March 1999, respondent Wykenna Watson filed a petition for a CPO in the Superior Court. J.A. 11–17. She alleged that on March 27 she had been brutally assaulted by her former boyfriend, petitioner John Robertson. J.A. 12, 40. After a hearing, the Superior Court issued a CPO prohibiting Mr. Robertson from, *inter alia*, assaulting, threatening, harassing, abusing, or contacting her. J.A. 20–25. The United States Attorney's Office separately charged him with serious crimes in connection with the events of March 27. J.A. 26–27.

Mr. Robertson proceeded to violate the CPO. On June 26, he demanded that Ms. Watson "drop" the

pending criminal charges and pushed her into a wall. Pet. App. A, at iv–v. On June 27, he threw industrial-strength drain cleaner on her, causing lye burns that required her hospitalization and extensive reconstructive surgeries. *Id.* at v–vi; J.A. 72.

In July 1999, Mr. Robertson and an Assistant United States Attorney entered a plea agreement to resolve the pending criminal charges relating to the March 27 incident. J.A. 28–30. It was handwritten on a standard form that both the United States Attorney's Office and the Office of the Corporation Counsel used in the Superior Court. *Id.* Because the Assistant United States Attorney was acting only on behalf of his own office, the signatories struck the words "District of Columbia" in the caption on the pre-printed form (leaving the caption as "United States vs. John Robertson") and the words "Assistant Corporation Counsel" below the signature line (leaving the words "Assistant U.S. Attorney"). *Id.* at 28, 30. Mr. Robertson agreed to plead guilty to attempted aggravated assault. *Id.* at 28. The "gov't" agreed to dismiss other charges and "not pursue any charges concerning an incident on 6-26-99." *Id.*

Ms. Watson separately filed her own motion to adjudicate criminal contempt in January 2000. J.A. 56–60. The motion was based on Mr. Robertson's actions on both June 26 and June 27, 1999. *Id.*

After trial in May 2000, the Superior Court found Mr. Robertson guilty on three counts of criminal contempt. Pet. App. A, at v–vi; J.A. 63–65. He was sentenced in June 2000 to three terms of 180 days in jail, one of which was suspended, and five years of probation. J.A. 63. He was also ordered to pay $10,009.23 in restitution for Ms. Watson's exten-

sive medical bills. J.A. 64. He appealed. Pet. App. A, at vi.

More than three years later, in November 2003, Mr. Robertson moved the Superior Court under D.C. Code § 23-110 (2001) to vacate his criminal contempt convictions. Pet. App. A, at vi. He argued that these convictions violated his plea agreement with the United States Attorney's Office and that his trial counsel had been ineffective in not so arguing. *Id.*

The Superior Court denied the motion. J.A. 89–93. It held "that the plea agreement . . . is binding only on the government and not on any party seeking to vindicate a right against [Mr. Robertson]." J.A. 92. He appealed from that order, and the appeal was consolidated with the pending direct appeal from his criminal conviction. Pet. App. A, at ii.

The District of Columbia Court of Appeals unanimously affirmed. Based on its precedent and the statutory language and purposes, the court read local law to confer "a private right of action to enforce the CPO through an intrafamily contempt proceeding." *Id.* at xii–xv. It rejected Mr. Robertson's argument "that such an action could only be brought 'in the name of the relevant sovereign, . . . the United States," rather than "in the name and interest of [Ms.] Watson." *Id.* at xiv. Because the United States was not a party to the contempt proceeding, the court held that the United States Attorney's Office's plea agreement did not affect the validity of the contempt convictions. *Id.* at xvii–xix.

SUMMARY OF ARGUMENT

1. The District of Columbia agrees with respondent that the Constitution allowed her to bring this

criminal contempt proceeding in her own name. Petitioner does not ask this Court to interpret District law. In any event, it would be improper under established principles of deference to disturb the reading of local law by the District of Columbia Court of Appeals.

This Court's practice is to defer to interpretations of District law by the District's courts save where "egregious error" has been committed. That practice is not only deeply embedded in precedent but also supported by the clear intent of Congress, which intended the District's local court system to be treated like a state court system in relevant respects. As this Court has held, deference is thus appropriate even where, for instance, deciding an issue of District law anew might avoid the need to decide a difficult constitutional question.

Far from constituting the egregious error that might warrant this Court's independent interpretation of District law, the reading adopted by the court below is well-supported. In decisions dating back more than two decades, the District's courts have recognized that the Council intended victims of domestic violence to have control over the CPO process themselves. The purposes underlying the legislative decision to give victims a private right of action to obtain CPOs are served by recognition of their ability to seek criminal contempt themselves for violation of those CPOs.

2. No separation-of-powers issue is properly presented because this case has to do with governance of the District, not of the nation. This Court has repeatedly recognized that Congress has plenary authority over the District and need not follow consti-

tutional separation-of-powers principles applicable to the national government when deciding how to structure the District's government. Indeed, Congress has often departed from the tripartite scheme of our national government in designing local government, with this Court's repeated approval.

Because constitutional separation-of-powers principles do not apply of their own force in the District, these principles could be relevant only to the extent Congress has incorporated them in the statutes under which the District's local government functions. This Court should not, however, decide any statutory issue, for multiple reasons. First, the statutory issues go to fundamental, contested, and complex questions regarding governance in the District but petitioner adverts to them only in a single, largely conclusory footnote. Second, petitioner did not raise any separation-of-powers issue — whether constitutional or statutory — in the lower courts. And third, because his separation-of-powers argument is in reality a statutory rather than constitutional argument, it is not fairly included in the question presented in this Court. Resolution of any statutory issue should await a case in which the issue has been properly presented in the courts below and in this Court.

If the Court nonetheless reaches the issue, it should conclude that Congress did not incorporate relevant constitutional separation-of-powers principles into the statutes by which it structured local government in the District. The District government critically departs from the national model with regard to prosecution of crimes. The Mayor holds the executive power of the District, but public prosecut-

ing duties in the District have long been shared by the District and the United States.

Petitioner incorrectly relies on statutes that limit the Council's ability to affect the prosecutorial authority of the United States. But those statutes are about relations between the two governments in the District, not the separation of powers within the local government. Moreover, there are two public prosecutors under District law. There is thus no reason to apply constitutional separation-of-powers principles regarding a legislature's ability to diminish the presumptive prosecutorial authority of a co-equal, unitary executive.

Furthermore, the relevant statutes do not track, or purport to track, constitutional separation-of-powers principles. Their history and text show instead that these statutes are meant to do specific things unconnected with separation-of-powers principles: D.C. Code § 23-101 sets a default rule allocating prosecutorial authority to either the United States or the District where the legislature has not identified a prosecutor, while D.C. Code § 1-206.02(a)(8) prevents the Council from divesting the United States Attorney of authority to prosecute any crime that he had exclusive authority to prosecute when the Home Rule Act was enacted. Neither provision gives petitioner a basis to argue that constitutional separation-of-powers principles apply here.

ARGUMENT

I. THE CONSTITUTION AND THE LAW OF THE DISTRICT OF COLUMBIA ALLOWED RESPONDENT TO BRING THIS CRIMINAL CONTEMPT ACTION IN HER OWN NAME.

The District of Columbia agrees with respondent that the Constitution allowed her to bring this criminal contempt proceeding in her own name. Petitioner does not directly challenge the lower court's holding that District law also allowed her to do so. Pet. App. A, at xii–xv. Even if he had done so, it would be improper under well-established principles of deference for this Court to disturb this reading of local law by the District of Columbia Court of Appeals.

Long before the Court Reform Act restructured the local judiciary in 1970, this Court adopted a practice of deferring to interpretations of District law by the District's courts. This longstanding practice is to refrain from "interfer[ing] with the local rules of law which they fashion, save in exceptional situations where egregious error has been committed." *Fisher v. United States*, 328 U.S. 463, 476 (1946); *see, e.g.*, *Griffin v. United States*, 336 U.S. 704, 712–18 (1949); *District of Columbia v. Pace*, 320 U.S. 698, 702 (1944); *Del Vecchio v. Bowers*, 296 U.S. 280, 285 (1935).

That practice became all the more appropriate with the Court Reform Act. "One of [Congress's] primary purposes . . . was to restructure the District's court system so that the District will have a court system comparable to those of the states and other large municipalities." *Pernell v. Southall Realty*, 416 U.S. 363, 367 (1974) (quoting H.R. Rep. No.

91-907, at 23). "This new structure plainly contemplates that the decisions of the District of Columbia Court of Appeals on matters of local law . . . will be treated by this Court in a manner similar to the way in which we treat decisions of the highest court of a State on questions of state law." *Id.* at 368. Thus, the principle that the Court should not "overrul[e] the courts of the District on local law matters 'save in exceptional situations where egregious error has been committed'" is both "long embedded in practice and now supported by the clear intent of Congress." *Id.* at 369 (quoting *Fisher*, 328 U.S. at 476); *see Palmore v. United States*, 411 U.S. 389, 409–10 (1973); *Key v. Doyle*, 434 U.S. 59, 64, 67–68 (1977).[1]

Pernell is particularly instructive. That case involved "whether the Seventh Amendment guarantees the right to trial by jury in an action brought in the District of Columbia." 416 U.S. at 363. The Court was "met at the outset by the suggestion" that it could "interpret the relevant statutes as providing for a right to jury trial," eliminating any need to decide the constitutional issue. *Id.* at 365. The Court

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[1] For similar reasons, this Court should decline to exercise supervisory power over the District of Columbia Court of Appeals in the same manner it does over Article III courts. In particular, it should not exercise supervisory power to overrule that court's resolution of an issue with no effect outside the District. *See Gay v. United States*, 411 U.S. 974, 975–76 (1973) (Douglas, J., dissenting from the denial of certiorari) (suggesting that the Court should apply supervisory power over a decision of the District of Columbia Court of Appeals that "has an impact not confined to the Potomac's shores" (quoting *General Motors Corp. v. District of Columbia*, 380 U.S. 553, 556 (1965)).

recognized "the 'cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the (constitutional) question may be avoided.'" *Id.* That principle does not allow the Court to resolve an issue of state law in order to avoid a federal constitutional issue. *Id.* at 368. The Court in *Pernell* thus declined to apply the principle of constitutional avoidance given the deference due to the District of Columbia Court of Appeals, which would be treated as a state court for this purpose, and the absence of any "obvious error" by that court. *Id.* at 365–69.[2]

Far from being obvious error, the local courts' reading of District law is well-supported. In holding that private parties themselves could prosecute criminal contempt actions, the Superior Court in 1989 and then the District of Columbia Court of Appeals in 1994 and in the decision under review prop-

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[2] Deference may be unnecessary when a constitutional issue "cannot be separated entirely" from an interpretive issue under District law. *Whalen v. United States*, 445 U.S. 684, 688 (1980); *cf. Kent v. United States*, 383 U.S. 541, 557–63 & n.27 (1966); *District of Columbia v. Little*, 339 U.S. 1, 4 n.1 (1950). That is not the case here. Petitioner does not even raise any statutory issue regarding the lower court's reasoning, let alone assert that this Court need resolve one to reach his discrete constitutional arguments. Moreover, given his exclusive focus on constitutional issues and the correspondingly limited scope of the question presented, it would be more appropriate to dismiss the writ of certiorari as improvidently granted than to decide issues of District law. *See, e.g., Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 356 n.1 (2001); *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 28 (1993) (per curiam).

erly relied on the Council's intent to allow victims of domestic violence to have control over the CPO process themselves. Pet. App. xii–xiii, xv; *Green*, 642 A.2d at 1279 & n.7; *Castellanos*, 117 Wash. L. Rep. at 1194.

In 1982, the Council gave victims of domestic violence a "private right of action" to seek CPOs on their own behalf, where before only the Office of the Corporation Counsel could do so. Report on Bill 4-195, at 2, 10; *see supra* pages 4–5. The District's courts have correctly perceived that the Council's purposes are served by allowing victims to enforce those CPOs in their own names through the contempt remedy set forth in D.C. Code § 16-1005(f). Pet. App. xii–xiii, xv; *Green*, 642 A.2d at 1279 & n.7. The Superior Court reasoned:

> It would have been quite illogical for the Council to attempt to correct a problem in its effort to control domestic violence by granting petitioners a private right to obtain civil protection orders without also intending to permit the same petitioners to enforce the provisions of those orders privately by utilization of the only enforcement mechanism contained in the statute.

Castellanos, 117 Wash L. Rep. at 1194. Indeed, at the same time it conferred a private right of action, the Council expressly decreed that "[t]he institution of criminal charges by the United States Attorney shall be in addition to, and shall not affect the rights

of the complainant to seek any other relief under this chapter." D.C. Code § 16-1002(c) (1989 repl.).[3]

The Council acted in part because government lawyers — in particular, lawyers from the Office of the Corporation Counsel — lacked the resources in 1982 to take all appropriate measures to protect victims' interests. Report on Bill 4-195, at 2, 10; *see* Pet. App. xii–xiii; *Green*, 642 A.2d at 1279 n.7; *Castellanos*, 117 Wash. L. Rep. at 1194. Although the proper interpretation of District law does not depend on what actually has transpired since then, subsequent events confirm that enforcement resources are still wanting even with the possibility of government involvement in prosecution of criminal contempt.

In 1992, the District's courts examined then-current practices in CPO cases. The resulting report detailed how CPOs "are considered one of the most effective means of preventing domestic violence" but how the promise of the District's CPO system was not being fully realized because of many litigants' *pro se* status, victims' failure to use "statutory protections . . . to the full extent possible," and in particular "a lack of effective enforcement of CPOs by use of the contempt power." District of Columbia

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[3] The District's courts have also relied upon court rules in deciding that private parties who have won CPOs should be able themselves to prosecute criminal contempt. Pet. App. xiii & n.5; *Green*, 679 A.2d at 1279; *see* Super. Ct. Intrafamily R. 7(c), 9(a), 12(c) (1987). Later court rules and later legislative history further support the repeated judicial conclusions that District law allows private parties to bring criminal contempt actions in their own names. *See supra* pages 5–8.

Courts, *Final Report of the Task Force on Racial and Ethnic Bias and Task Force on Gender Bias in the Courts* 142 (May 1992). The report revealed that there were few motions for contempt relative to the number of requests for CPOs and that only a small percentage of motions for contempt led to incarceration. *Id.* at 152–53. The report suggested that judges make greater efforts to appoint attorneys from the Office of the Corporation Counsel or other attorneys (especially pro bono attorneys) to represent private petitioners. *Id.* at 154, 163. That the courts saw a need for increased representation of private parties in pursuing criminal contempt shows that government prosecution of criminal contempt — either by the United States Attorney on behalf of the United States or by the Office of the Corporation Counsel on behalf of the CPO holders — was not meeting enforcement needs.

The Office of the Attorney General (as it is now known) has not had the resources since that report was written to represent close to all those who seek contempt sanctions for violation of CPOs, nor is there any organized program for appointment of *pro bono* attorneys for this purpose. Statistics on file at the Superior Court show a great continuing need in the District for both CPOs and contempt enforcement. Over the last five years, the court has issued an annual average of 1796 CPOs (including orders issued after adjudication, consent orders, and default orders) and received an annual average of 274 motions for contempt (including motions for both civil and criminal contempt). Just as in 1982, when the Council provided private parties with a private right of action, there remains a vital role for private prose-

cution of criminal contempt in combating domestic violence in the District.

II. NO SEPARATION-OF-POWERS ISSUE IS PROPERLY BEFORE THIS COURT.

A. There is no constitutional separation-of-powers issue because separation-of-powers principles applicable to the national government under the Constitution do not apply as to governance of the District, over which Congress has plenary authority.

There is no constitutional issue regarding the separation of powers in the District. The Constitution empowers Congress "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may . . . become the Seat of the Government of the United States." U.S. Const. art. I, § 8, cl.17. "The power is plenary." *Palmore*, 411 U.S. at 397.

Exercising this authority, Congress need not follow constitutional separation-of-powers principles applicable to the national government when deciding how to structure local government in the District. As this Court established long ago, "Congress has the entire control over the district for every purpose of government . . . ." *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 619 (1838). "Congress' power over the District of Columbia encompasses the *full* authority of government, and thus, necessarily, the Executive and Judicial powers as well as the Legislative." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 76 (1982) (plurality op.).

Congress has adopted many different forms of local government for the District since its establish-

ment in 1801, sometimes departing dramatically from the tripartite scheme of our national government. *See generally* Staff of the House Committee on the District of Columbia, 101st Cong., *Governance of the Nation's Capital: A Summary History of the Forms and Powers of Local Government for the District of Columbia, 1790 to 1973* (Comm. Print 1990). For example, beginning in 1874 and lasting for nearly a century, a board of commissioners with three members appointed by the President governed the District. *Id.* at 43–50; Act of June 20, 1874, ch. 337, 18 Stat. 116. This Court has repeatedly upheld such decisions by Congress to deviate from the national separation-of-powers model. *E.g.*, *Palmore*, 411 U.S. at 397–98, 407–10 (upholding Congress's decision to create a local court system for the District that exercises power under Article I and is not subject to Article III's tenure and salary provisions); *Keller v. Potomac Elec. Power Co.*, 261 U.S. 428, 442–44 (1923) (upholding Congress's decision to allow local courts in the District to exercise legislative authority that Article III courts could not exercise).

In this respect, Congress's authority over the District resembles its authority over the territories:

> It must be remembered that Congress, in the government of the territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the Constitution; that the form of government it shall establish is not prescribed, and may not necessarily be the same in all the territories. We are accustomed to that generally adopted for the territories, of a *quasi* state government, with executive, legislative, and judicial

> officers, and a legislature endowed with the power of local taxation and local expenditures; but Congress is not limited to this form.

Binns v. United States, 194 U.S. 486, 491 (1904).

Of particular relevance here, this Court has held that Congress need not leave prosecution in federal enclaves solely to the federal executive branch. In *Snow v. United States*, 85 U.S. 317 (1873), the Court considered whether the then-territory of Utah could grant authority to prosecute crimes under territorial laws to local executive officers elected by the territorial legislature, rather than "[t]he attorney appointed by the President for the Territory . . . to attend to the business of the General Government." *Id.* at 320–21. This Court held that the territorial legislature could do so, as the arrangement was consistent with the organic act Congress had passed for the territory and "the entire matter is subject to the control and regulation of Congress." *Id.* at 321–22.

The same is true in the District given the scope of Congress's authority over it. *See District of Columbia v. John R. Thompson Co.*, 347 U.S. 100, 106–07 (1953) ("The power of Congress to grant self-government to the District of Columbia . . . would seem to be as great as its authority to do so in the case of territories."). Thus, Congress has long empowered the local government of the District to prosecute crimes in its own name. *See id.* at 112–13; *infra* pages 27–29. Whatever the particular form of local government in place at a time, the District's prosecutors have derived power from Congress and Article I of the Constitution, not the federal executive branch and Article II. *See Metropolitan R.R. Co.*

v. District of Columbia, 132 U.S. 1, 8–9 (1889); *Barnes v. District of Columbia*, 91 U.S. 540, 545–46 (1875). The suggestion that only the federal executive branch may prosecute crimes in the District is thus both contrary to this Court's precedent and ahistorical.[4]

That suggestion also makes no sense given the source of constitutional separation-of-powers principles. They derive, of course, from the particular provisions in the Constitution that empower and constrain the branches of the national government. Such provisions do not by their terms apply to the relationships between branches of other governments. The Court has thus "held that the doctrine of separation of powers embodied in the Federal Constitution is not mandatory on the States." *Whalen*, 445 U.S. at 689 n.4; *see, e.g.*, *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902). The same must be true for Congress as to the District, over which it has "all the legislative powers which a state may exercise over its affairs" absent any specific constitutional limitation. *Berman v. Parker*, 348 U.S. 26, 31 (1954).[5]

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[4] Petitioner quotes *Metropolitan Railroad Co.* and *Snow* to assert that, technically, there should be no "crimes against the District," only crimes against the United States. Pet. Br. 56 n.23. As the *Snow* Court explained, the practice of allowing territories to prosecute in their own names "exhibits somewhat of an anomaly" because "there is no sovereignty in a Territory of the United States but that of the United States," but the practice is nonetheless lawful. 85 U.S. at 321–22.

[5] Constitutional limitations on Congress's national authority do not necessarily apply when Congress legislates for the District. *See Loughboro v. Blake*, 18 U.S. (5 Wheat.) 317, 318

B. Given petitioner's failure to present and preserve the issue properly, the Court should not consider whether Congress has incorporated constitutional separation-of-powers principles into the statutes under which the District's local government functions.

Because constitutional separation-of-powers principles do not apply of their own force in the District, these principles could be relevant only to the extent Congress has incorporated them in the statutes under which the District's local government functions. Petitioner effectively concedes as much but barely discusses those statutes, devoting only a single, largely conclusory footnote to explaining why constitutional separation-of-powers principles apply here. Pet. Br. 55 n.23.

This Court should not decide such important statutory issues without proper briefing. The statutory issues go to fundamental questions regarding governance in the District, and in particular the power of the locally accountable Council to control who prosecutes local crimes in the District. The scope of

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(1820). For example, before the Sixteenth Amendment was ratified, this Court enforced the Article I limitation on Congress's power to impose a "Capitation, or other direct, Tax." U.S. Const. art. I, § 9, cl.4; *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895). Nonetheless, the Court held that the limitation did not apply to a real estate tax enacted by Congress limited to the District. *Gibbons v. District of Columbia*, 116 U.S. 404, 407–08 (1886).

that power remains hotly contested in the District's local courts.[6]

Petitioner also failed to preserve any separation-of-powers argument — whether constitutional or statutory — in the lower courts, or even earlier in this Court. The first time he presented any argument on this point was in his brief on the merits. "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *see supra* pages 14–16.

Nor would consideration of any statutory issue be appropriate without proper preservation. Especially given Congress's intention to make the District's courts the equivalent of state courts on such issues, *see supra* pages 14–16, this Court should not rush ahead to decide issues that were not presented or considered there. Even before the Court Reform Act, this Court explained:

> There are cogent reasons why this Court should not undertake to decide questions of local law without the aid of some expression of the views of judges of the local courts who are familiar with the intricacies and trends of local law and practice. We do not ordinarily decide such questions without that aid

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[6] In *In re Crawley*, 978 A.2d 608 (D.C. 2009), the District of Columbia Court of Appeals held that the Council could not assign the District rather than the United States authority to prosecute a particular newly enacted crime. *Id.* at 609. A petition for rehearing en banc is pending.

> where they may conveniently be decided in the first instance by the court whose special function it is to resolve questions of the local law of the jurisdiction over which it presides.

Busby v. Electric Util. Employees Union, 323 U.S. 72, 74–75 (1944) (per curiam).

On a related note, because petitioner's separation-of-powers argument is in reality a statutory rather than constitutional argument, it is not fairly included in the question presented in this Court. That question is limited to constitutional issues. "A question which is merely 'complementary' or 'related' to the question presented in the petition for certiorari is not 'fairly included therein.'" *Izumi*, 510 U.S. at 31--32 (quoting *Yee v. City of Escondido*, 503 U.S. 519, 537 (1992)) (internal quotation marks omitted).

C. In any event, relevant statutes do not incorporate constitutional separation-of-powers principles regarding executive authority to prosecute crimes or criminal contempt.

If the Court nonetheless reaches the issue, it should conclude that Congress did not incorporate relevant constitutional separation-of-powers principles into the statutes by which it structured local government in the District. The Mayor holds the executive authority of the District under D.C. Code § 1-204.22 (2009 supp.), but that authority does not include authority to prosecute all local crimes. Public prosecuting duties in the District have long been shared by the District and the United States.

Petitioner suggests nonetheless that the statutes defining the Council's authority incorporate relevant

constitutional separation-of-powers principles, apparently because those statutes limit the Council's ability to affect the prosecutorial authority of the United States. Pet. Br. 55 n.23. This suggestion fails at the outset for two reasons. First, the relevant statutes — D.C. Code § 23-101 (2001) and § 1-206.02(a)(8) (2006 repl.) — are about relations *between* the two governments in the District, not the separation of powers *within* the local government. Second, despite petitioner's attempt to diminish the District's prosecutorial authority, it is plain that there are two public prosecutors under District law, both *de jure* and *de facto*. There is thus no reason to apply constitutional separation-of-powers principles regarding a legislature's ability to diminish the presumptive prosecutorial authority of a co-equal, unitary executive.

Moreover, the history and text of those statutes demonstrates that they do not track constitutional separation-of-powers principles. In 1901, Congress passed a comprehensive code of law for the District, including a detailed criminal code. Act of Mar. 3, 1901 (1901 Code), ch. 854, 31 Stat. 1189. Congress also left some municipal ordinances and regulations in place. *Id.* § 1640, 31 Stat. at 1436. Section 932 of the 1901 Code specified who would prosecute offenses under the new code and pre-existing law:

> Prosecutions for violations of all police or municipal ordinances or regulations and for violation of all penal statutes in the nature of police or municipal regulations, where the maximum punishment is a fine only, or imprisonment not exceeding one year, shall be conducted in the name of the District of Co-

> lumbia and by the city solicitor or his assistants. All other criminal prosecutions shall be conducted in the name of the United States and by the attorney of the United States for the District of Columbia or his assistants.

Id. § 932, 31 Stat. at 1340–41.[7]

Congress understood Section 932 to establish only a default rule to assign prosecutorial authority where the criminal ordinance, regulation, or statute at issue did not itself make the assignment clear. Both in the 1901 Code itself and through the ensuing decades, Congress repeatedly assigned prosecutorial authority without following that default rule — for instance, in statutes explicitly giving the District authority to prosecute where the permissible penalty included both imprisonment and a fine, rather than only one or the other.[8] Indeed, Congress amended

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[7] As this provision implies, the District's commissioners in 1901 had power to issue "usual and reasonable police regulations," one of many powers the Council holds today. Act of Jan. 26, 1887, ch. 49, 24 Stat. 368; D.C. Code § 1-303.01 (2006 repl.). Furthermore, District law at the time included municipal ordinances passed by earlier local governments, including the cities of Washington and Georgetown before their abolishment as separate entities. Act of Feb. 21, 1871, ch. LXII, § 40, 16 Stat. 419, 428. Prosecution in the name of the District thus has long historical roots. *See, e.g., District of Columbia v. Herlihy*, 8 D.C. (1 MacArth.) 466 (D.C. 1874).

[8] *E.g.*, 1901 Code, §§ 684–85, 31 Stat. at 1298. By 1968, Congress had directed the District to prosecute at least thirty-nine offenses where the default rule would have indicated otherwise. *District of Columbia v. Grimes*, 404 F.2d 1337, 1340–41 (D.C. Cir. 1968).

the statute in 1968 to give the District authority to prosecute offenses relating to disorderly conduct and lewd acts in order to overturn a court decision that had applied the default rule. Act of July 30, 1968, Pub. L. No. 90-441, 82 Stat. 460; *see* S. Rep. No. 90-1360 (1968); D.C. Code § 23-101(b).

In 1970, Congress enacted the current successor to Section 932. Court Reform Act, § 210(a), 84 Stat. at 604–05. D.C. Code § 23-101 directs some crimes to be prosecuted by the District and others by the United States, but also makes plain that it continues to set only a default rule for allocating prosecutorial authority where it is not otherwise specified. Subsection (a) states that the District should prosecute crimes with certain characteristics "except as otherwise provided in [the] ordinance, regulation, or statute [at issue], or in this section." Subsection (c) in turn states that the United States prosecutes other crimes "except as otherwise provided by law."

Petitioner's apparent belief that D.C. Code § 23-101 is a separation-of-powers statute (Pet. Br. 55 n.23) is thus mistaken. From long before the creation of the current District government, it has addressed only whether the United States or the District should prosecute a crime where the legislature has not identified a prosecutor. The statute has nothing to do with relations between branches either within the federal government or within the District government.

That petitioner's reliance on the statute is misplaced is particularly clear given that it contemplates that the District's local government — not just Congress — may allocate prosecutorial authority without following the default rule. The statute sim-

ply does not support petitioner's contrary reading. Pet. Br. 55 n.23; *cf. District of Columbia v. Sullivan*, 436 A.2d 364, 368 (D.C. 1981) (rejecting an argument similar to petitioner's argument). His reading is inconsistent with the statute's references to "ordinance[s]" and "regulation[s]" that "otherwise provide[]." D.C. Code § 23-101(a), (c). The District's local government sometimes enacts law through ordinances and regulations, but Congress itself enacts law for the District only by legislation. *See supra* page 28, note 7; D.C. Code § 1-206.01 (2006 repl.). The necessary conclusion is that Congress in 1970 recognized that the District could assign prosecutorial authority without adhering to the default rule.

Moreover, just three years later, in passing the Home Rule Act, Congress made clear its intent to delegate broad legislative power to the Council given its purpose of "grant[ing] to the inhabitants of the District of Columbia powers of local self-government." D.C. Code §§ 1-201.02(a), 1-203.02, 1-204.04. Absent application of any explicit limitation in the Home Rule Act, the Council has the same authority that Congress itself had under D.C. Code § 23-101 to "otherwise provide[]." The only potentially relevant limitation in the Home Rule Act bars the Council from "[e]nact[ing] any act or regulation . . . relating to the duties or powers of the United States Attorney." D.C. Code § 1-206.02(a)(8).[9]

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[9] Petitioner also cites D.C. Code § 1-206.02(a)(3) (2006 repl.), which limits what the Council can do "concern[ing] the functions . . . of the United States." Pet. Br. 56 n.23. The District of Columbia Court of Appeals has held, however, that this

Petitioner incorrectly reads that provision to prevent the Council from "affect[ing] the power or prosecutorial authority of the United States" in any way. Pet. Br. 56 n.23. Even if that were true, the statute would not incorporate any constitutional separation-of-powers principle for two reasons. First, again, the statute is again about relations between governments, not within a government. Second, the Constitution does not require "a hermetic sealing off of the three branches of Government." *Buckley v. Valeo*, 424 U.S. 1, 121 (1976). Whether the Council could allow private parties rather than the United States to prosecute criminal contempt thus may pose an issue of statutory interpretation, but not an issue involving constitutional separation-of-powers principles.

In fact, properly read, D.C. Code § 1-206.02(a)(8) neither tracks separation-of-powers principles nor divests the Council completely of authority to affect the prosecutorial activities of the United States. Instead, it merely prevents the Council from shifting authority for prosecuting any crime that the United States Attorney had exclusive authority to prosecute when the Home Rule Act was enacted in 1973.

At that time, defining the United States Attorney's "duties" and "powers," and thus the scope of

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limitation pertains only to functions "that are national in scope," not "performance of a local function by federal officials." *District of Columbia v. Greater Wash. Cent. Labor Council, AFL-CIO*, 442 A.2d 110, 115–16 (D.C. 1982). That reading is supported by the statutory text and legislative history, and this Court should defer to it. *Id.*; *see supra* pages 14–16.

the limitation in D.C. Code § 1-206.02(a)(8), necessarily required looking crime-by-crime to see whether he had been assigned prosecutorial authority. Nothing in the Home Rule Act purported to transform the default rule in D.C. Code § 23-101 into a universal one. Indeed, given Congress's purpose of promoting home rule, it is implausible to think that the Home Rule Act *lessened* the District's pre-existing authority to assign prosecutorial authority in at least some circumstances. *See supra* pages 29–30. Thus, as the United States explained before the lower court in this case, the Council could "otherwise provide[]" within the meaning of D.C. Code § 23-101 by allowing private parties to prosecute criminal contempt, given that it was "well settled that courts have inherent authority to appoint prosecutors other than the United States Attorney to prosecute criminal contempt." U.S. C.A. Br. 21 & n.9.

The legislative history of the Home Rule Act confirms that D.C. Code § 1-206.02(a)(8) does not limit the Council's authority to allocate authority to prosecute crimes that the United States Attorney did not have exclusive authority to prosecute at the time. When that provision was added, the bill that became the Home Rule Act would have prohibited the Council from ever amending Titles 22, 23, and 24 of the D.C. Code, and thus from enacting new crimes or affecting criminal procedure. Staff of the House Committee on the District of Columbia, *Home Rule for the District of Columbia 1973–1974: Background and Legislative History of H.R. 9056, H.R. 9682, and Related Bills Culminating in the District of Columbia Self-Government and Governmental Reorganization Act* (Home Rule Legislative History) 2084, 2117,

2317–18 (Comm. Print 1974). The provision preventing the Council from enacting legislation with respect to the United States Attorney's duties or powers accordingly referred to duties or powers under the criminal law as it existed at the time. Rep. Diggs, who was the Chairman of the House Committee on the District of Columbia, stated that the provision would "prohibit Council from *changing* functions or duties" of the United States Attorney. *Id.* at ii, 2084 (emphasis added). Rep. Harsha similarly stated that he was "convince[d] . . . that under this bill all *present* functions undertaken by the U.S. Attorney would remain in that office." *Id.* at 2151 (emphasis added); *see id.* at 2152 (similar statement by Rep. Adams).

The Conference Committee crucially changed the bill such that the Council was prohibited from amending Titles 22, 23, and 24 only for two years. *Id.* at 2983, 3013; D.C. Code § 1-206.02(a)(9) (2006 repl.); *see McIntosh v. Washington*, 395 A.2d 744, 750–51 (D.C. 1978). After that, as Rep. Diggs stated, "it seems appropriate and consistent with the principle of self-determination, that the Council be given the authority to make whatever subsequent modifications in the criminal code as are deemed necessary." Home Rule Legislative History 3041–42.

The text of what became D.C. Code § 1-206.02(a)(8) did not change when the Conference Committee decided to allow the Council to legislate regarding substantive criminal law and criminal procedure. That provision was designed to address crimes that the United States Attorney then had the exclusive "dut[y]" and "power[]"to prosecute. If Congress had intended to change the scope of the provi-

sion to limit the Council's ability to assign prosecutorial authority over other crimes, Congress would have altered the provision's language. That is especially clear given that Congress explicitly allowed the Council to amend the criminal code, and thus at minimum to create new crimes for the United States to prosecute, without any indication that Congress feared the Council might thereby run afoul of D.C. Code § 1-206.02(a)(8). Petitioner's suggestion that the Council cannot affect the prosecutorial authority of the United States in any way because of D.C. Code §§ 1-206.02(a)(8) and 23-101 is thus incorrect.

Indeed, petitioner presents no meaningful analysis of these statutes and cites only one case in which the Court interpreted statutes by reference to constitutional separation-of-powers principles. Pet. Br. 55 n.23. That case is readily distinguishable. In *Springer v. Philippine Islands*, 277 U.S. 189 (1928), the Court considered whether the Philippine legislature could appoint its own officers to a board that would control an executive function. *Id.* at 197–200. The Court concluded that certain separation-of-powers principles akin to those found in the Constitution inhered in the organic act of the Philippine government because it established a tripartite system like that of the national government. *Id.* at 200–01, 205–06. The Court did not hold, however, that Congress necessarily must incorporate *all* constitutional separation-of-powers principles whenever it incorporates *any* such principles by statute.

This case is unlike *Springer* in that there are specifically applicable statutes making it improper to resort to general notions of what the branches in a tripartite scheme generally are empowered to do. To

be sure, "Congress has established a government for the District of Columbia that incorporates constitutional notions of separation of powers." Pet. Br. 55 n.23; *see Wilson v. Kelly*, 615 A.2d 229, 231–32 (D.C. 1992). But it has not incorporated them as relevant here.

CONCLUSION

This Court should affirm the judgment of the District of Columbia Court of Appeals.

Respectfully submitted,

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MARCH 8, 2010

AMICUS CURIAE BRIEF

No. 08-6261

In The

Supreme Court of the United States

JOHN ROBERTSON, PETITIONER,

v.

WYKENNA WATSON

ON WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR DOMESTIC VIOLENCE LEGAL EMPOWERMENT AND APPEALS PROJECT AND OTHER DOMESTIC VIOLENCE ORGANIZATIONS, SCHOLARS, AND PROFESSIONALS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether an action for criminal contempt in a congressionally created court may constitutionally be brought in the name and pursuant to the power of a private person, rather than in the name and pursuant to the power of the United States.

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BRIEF FOR DOMESTIC VIOLENCE LEGAL EMPOWERMENT AND APPEALS PROJECT AND OTHER DOMESTIC VIOLENCE ORGANIZATIONS, SCHOLARS, AND PROFESSIONALS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

The Domestic Violence Legal Empowerment and Appeals Project (DV LEAP) and other domestic violence organizations, scholars, and professionals respectfully submit this brief as amici curiae in support of respondent.[1]

INTEREST OF AMICI CURIAE

Amici curiae consist of national, regional and local organizations dedicated to assisting victims of domestic violence and advancing law and policy to improve the legal system's response, as well as leading scholars, former prosecutors, and a former judge, all of whom have devoted much of their career to domestic violence legal work. Amici share a profound appreciation of the civil protection order system and

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[1] Letters from the parties consenting to the filing of this brief are being filed with the Clerk of the Court, pursuant to Rule 37.3(a). No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. The identities and descriptions of the amici are in the appendix to this brief.

its vital importance for victims of abuse. Amici believe that to treat contempt enforcement actions as identical to criminal prosecutions would deprive victims of a critical avenue for taking control of their lives back from their abusive partners.

SUMMARY OF ARGUMENT

Although the question presented in this case addresses the narrow issue of in whose "name" and pursuant to whose "power" an action for criminal contempt "in a *congressionally* created court" may be brought, petitioner's brief can be read to present a far broader challenge to the civil protection order ("CPO") system and CPO private enforcement throughout the nation. While the Court should decline petitioner's invitation to stray beyond the question presented, amici submit this brief to demonstrate the importance of CPOs and their private enforcement in both the District of Columbia and elsewhere, and to discredit petitioner's hyperbolic claims that CPOs unleash a virtually unbounded private criminal code against those abusers who violate protection orders.

A.1. The CPO system is a critical component of the response to domestic violence. CPOs provide important legal intervention against continued abuse. CPOs also, by design, empower victims to counteract the subjugation imposed by the abuser and give victims an avenue they can control for the prevention of further abuse. Because CPOs combine legal intervention with victim empowerment, CPOs are considered by many experts to be the most effective legal remedy against domestic violence.

2. CPOs have little value, however, if they are not consistently enforced, and enforcement has long been, and to this day remains, the "Achilles heel" of the system. Although every State now provides

some means of enforcement, widespread under-enforcement causes batterers to flout protection orders with impunity.

3. Public enforcement cannot substitute for private criminal contempt proceedings to enforce violations of CPOs. Despite significant strides by the criminal justice system in responding to domestic violence, public enforcement is still erratic and inconsistent. Prosecutors are often reluctant to bring charges for CPO violations except in very limited circumstances. Law enforcement officers continue to treat many CPO violations as civil matters, despite the tragic lessons of cases such as *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748 (2005), where, notwithstanding a mother's pleas to police to enforce her protection order, her children were abducted and murdered. And, even when law enforcement is inclined to intervene, both prosecutors and police often lack the resources to address the high volume of CPO violations.

Private criminal contempt actions allow victims to seek protection from further violations of their protection orders in the many instances when law enforcement does not. It provides an expedited response that the victim can control, and sometimes provides the only means for the victim to ensure her own safety. Eliminating a victim's right to enforce her own protection order would eviscerate the CPO remedy and would be a profound loss to victims of abuse.

4. This Court should decline to address petitioner's broad attacks on private criminal contempt enforcement, which exceed the narrow question presented, because petitioner explicitly waived the broader challenge below. On the narrow question actually presented—whether respondent could only pursue contempt "in the name and pursuant to the power of the United States"—it is clear that a regime in which a private party can seek criminal contempt sanctions for violations of a CPO, but only in the name and pursuant to the authority of the government, would be incapable of coherent implementation.

B.1. Although petitioner argues that he has "a right to be criminally prosecuted by the government," there is no such right, and in any event, criminal contempt is not identical to criminal prosecution. This Court has repeatedly held that contempt is sui generis, and while enforcement of a CPO through criminal contempt does vindicate the public interest in enforcement of court orders, the predominant interest vindicated is that of the private party whose civil order was violated. And petitioner cannot claim he was denied any of the full panoply of due process protections ordinarily required in a criminal contempt proceeding.

2. Petitioner's assertion that victims will bring vengeful or unsupported contempt proceedings is belied by the dynamics of domestic violence. Both amici's experience and the available evidence show that many victims are hesitant and ambivalent about

criminal contempt actions, and commonly prefer civil alternatives that are more favorable to the violator of the CPO.

Nor does this Court's ruling in *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), require a disinterested prosecutor in this case. The concerns that animated *Young* are simply not present in the private enforcement of CPOs, where the domestic violence victim, rather than the abuser, is most often the party who lacks resources or litigation power. And, the financial and tactical conflicts of interest presented in *Young*, where monetary damages were sought, simply do not apply in CPO contempt proceedings where the victim primarily seeks to ensure her safety.

3. Finally, petitioner's so-called "right to be prosecuted by the State" cannot be reconciled with the traditional fairness concerns that undergird due process protections. Constitutional protections for criminal defendants are traditionally aimed at leveling the playing field for the defendant and limiting the use of power by the State. But requiring state prosecution of CPO enforcement actions would mean that violators like petitioner would be required to face the full prosecutorial power of the State, rather than the far more limited and constrained powers of private parties such as respondent.

ARGUMENT

THE CONSTITUTION DOES NOT PROHIBIT THE BENEFICIARY OF A CIVIL PROTECTION ORDER FROM ASKING A COURT TO FIND A VIOLATOR IN CRIMINAL CONTEMPT

A. Private Litigation To Enforce Civil Protection Orders Is A Necessary Means To Remedy And Prevent Violations Of Those Orders

In this case, petitioner violently attacked respondent, hitting and kicking her until her nose was broken, one of her eyes was severely injured, and she suffered bruises and lacerations all over her body. To prevent further abuse, respondent sought and obtained a CPO in her local trial court, which unconditionally ordered petitioner to stay away and not abuse her. Petitioner, however, again attacked respondent so viciously that she required hospitalization in an intensive care unit. For this violation of the court order, petitioner was ordered to pay restitution, spend approximately a year in jail, and given five years' probation.

As egregious as respondent's situation appears, it is far from exceptional. CPOs, which put the authority of a court behind an order directed personally to the abuser, provide a critical legal intervention, but only with meaningful enforcement. Where, as here, the restraining order does not itself stop the abuse, permitting—indeed encouraging—the victim to bring

her abuser back to court to enforce the order is essential.

1. The private civil protection order system is a critical component of the legal response to domestic violence

a. Until relatively recently in the history of this country, domestic violence was a private family matter. Police would not arrest, prosecutors would not prosecute, and courts would tell victims to go home and work it out. *See, e.g.*, Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy,* 2004 WISC. L. REV. 1657, 1663-1664 (2004) (detailing how, at every stage of the process, domestic violence was not a matter for the criminal justice system). Indeed, arrest avoidance was even an explicit national police policy. *See* Int'l Ass'n of Chiefs of Police, *Training Key #16: Handling Disturbance Calls* 94-95 (1968-1969) ("In dealing with family disputes the power of arrest should be exercised as a last resort."). This official inaction reinforced the abuser's perception that he was doing nothing wrong, which in turn contributed to the extremely high rates of recidivism associated with domestic violence. Andrew R. Klein, Nat'l Crim. Justice Reference Serv., *Practical Implications of Current Domestic Violence Research, Part I: Law Enforcement* 16 (Apr. 2008), *available at* http://www.tinyurl.com/kleinNCJRS (last visited Mar. 6, 2010) (reviewing multiple key studies and concluding that "arrest [and other police response] deters repeat reabuse").

b. CPOs were a powerful remedy invented to respond to the failure of the criminal justice system to afford any protection to victims. First invented in 1970 in the District of Columbia, CPOs soon were adopted by every State, and have since become an essential legal remedy for victims of abuse. *See* Sack, *supra*, at 1667; *Cruz-Foster v. Foster*, 597 A.2d 927, 931 (D.C. 1991) (the IntraFamily Offenses Act "was designed to counteract the abuse and exploitation of women and children" through establishment of a civil injunctive remedy).

In addition to providing a valuable legal intervention against abuse, the CPO system was deliberately designed to be accessible and empowering to victims. For many women, protection orders symbolize the retaking of power back from the abuser. In a study of Boston area courts, for example, women stated that their protection orders showed the abuser they "meant business"; "proved something to him and * * * to myself"; countered the abuser's belief that "he had power over me * * * [as] it got him to back off and realize that he couldn't treat me like he did"; and made them "feel less powerless, like there's something to do." James Ptacek, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSE 165-166 (1999); *see also* Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1508 (2008) ("Civil protection orders offer battered women a greater opportunity to exercise their autonomy

because [they] are initiated and directed by the victim for her own benefit.").

The importance of empowering victims to stop abuse flows directly from the central dynamic of domestic violence, which is more than simply an outburst of violence. Domestic violence is at its essence the *use* of violence to subordinate and control another person. Evan Stark, COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE 5 (2007). The harm of domestic violence is far more than just the violence—it is the systematic stripping of power and autonomy from the victim. *Ibid.* ("[B]attering [is the] * * * interweaving [of] repeated physical abuse with * * * intimidation, isolation, and control. * * * [T]he primary harm abusive men inflict * * * [is] the deprivation of rights and resources that are critical to personhood and citizenship."). CPOs offer a critical opportunity to enlist the legal system to disrupt the abuser's pattern of subordination and domination. Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL'Y REV. 93, 120 (2005) (CPOs empower victims by giving them control in what is otherwise a "powerless situation"); Goldfarb, *supra*, at 1515 (to many women, "obtaining a protection order is 'its own reward,'" "empowering" because it allows them to "stand[ ] up to the abuser"); Tamara L. Kuennen, *"No-Drop" Civil Protection Orders: Exploring the Bounds of Judicial Intervention in the Lives of Domestic Violence Victims*, 16 UCLA WOMEN'S L.J. 39, 49 (2007) (domestic violence victims seek CPOs for safety, "to

have control in their lives," and to enlist the law in acting as a "loudspeaker" for their insistence that abuse is prohibited).

Thus, amici and other domestic violence lawyers and advocates across the country rely on CPOs as the primary means by which victims of domestic violence can exert legal power against violent abusers.

2. *Enforcement is the "Achilles heel" of the civil protection order system*

Despite the significant advancement in legal protections for abuse victims that CPOs have provided, the "Achilles heel" of the CPO process has long been, and to this day remains, enforcement. Peter Finn & Sarah Colson, U.S. Dep't of Justice, *Civil Protection Orders: Legislation, Current Court Practice, and Enforcement* 49 (1990) ("an order without enforcement at best offers scant protection and at worst increases the victim's danger by creating a false sense of security").

a. CPOs have proven surprisingly effective in some respects.[2] But there is "considerable anecdotal

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[2] *See* Ptacek, *supra*, at 164 (recipients describing many benefits of CPOs). A National Center for State Courts study of three states found that 92.7% of respondents who obtained a CPO stated that they felt better and 80.5% stated that they felt safer. Susan L. Keilitz et al., Nat'l Center for State Courts Research Report, *Civil Protection Orders: The Benefits and Limitations for Victims of Domestic Violence* 38 (1997), *available at* http://tinyurl.com/NCSCStudy (last visited Mar. 6, 2010). And a recent Kentucky study found that even among the 50% of

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evidence * * * that some batterers flout civil protection orders with impunity." Finn & Colson, *supra*, at 49; *see also* David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 OHIO ST. L.J. 1153, 1194 (1995) ("lack of enforcement is still cited as the principal weakness of protection orders"). Indeed, research into CPO compliance has consistently shown that CPOs are violated approximately half the time. *See, e.g.*, Kentucky Civil Protection Order Violation Study, *supra* note 2, at 97 (finding that during the six-month follow-up period after women obtained a protective order, half reported a violation of the protective order); Goldfarb, *supra*, at 1512 (citing a Colorado study that found sixty percent of women who obtained orders reported re-abuse during the following year and a Massachusetts study that found forty-nine percent of offenders re-abused their victims within two years).

It is of no moment that some violations might *appear* innocuous—e.g., telephone calls, stay-away violations, verbal threats, and child visitation violations. *See, e.g.*, Kentucky Civil Protection Order

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protection order recipients that experienced violations, most said the abuse and their fear decreased. TK Logan et al., *The Kentucky Civil Protective Order Study: A Rural and Urban Multiple Perspective Study of Protective Order Violation Consequences, Responses, and Costs* [hereinafter Kentucky Civil Protection Order Violation Study] at 97-98 (2009), *available at* http://www.tinyurl.com/kentuckystudy (last visited Mar. 6, 2010).

Violation Study, *supra*, at 99; Ptacek, *supra*, at 163-164; Goldfarb, *supra*, at 1512. The significance of these purportedly "harmless" violations cannot be overlooked. First, harassment commonly escalates if ignored, and even so-called "minor" abuse is often the prelude to lethal violence. Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 859 (1993) ("Social science research reveals that threats and harassment, left unchecked, frequently escalate to greater violence."). Second, the failure to respond to "minor" violations sends a clear message that the order need not be obeyed, which increases the likelihood of "major" violations in the future. *See* Goldfarb, *supra*, at 1516 (lack of enforcement may be "largely responsible for * * * high rates of non-compliance with protection orders"). Third, while some violations may appear unthreatening to the outside observer, in context of a history of abuse and terror, they are not. Rather, they almost always represent continued determination to control and intimidate the victim; even innocuous acts, such as sending a birthday card, can thus be terrorizing. Lynn Hecht Schafran, *Why Empirical Data Must Inform Practice,* in VIOLENCE AGAINST WOMEN: LAW AND LITIGATION 1-1, 1-57 (Frazee, Noel & Brenneke eds., 1997) (sending roses can be a message of intimidation and ownership to a victim who has made her desire for no contact clear).

b. When CPO violations occur, every State provides some means of enforcement, whether by

privately- or judicially-initiated contempt proceedings or state prosecution for violation of a protection order.

While a court always possesses the "inherent authority" to hold a party before it in contempt of the court's orders, *Young*, 481 U.S. at 801, the procedures for bringing contempt actions differ among jurisdictions. Thirty-eight States and the District of Columbia have expressly specified avenues for public and/or private enforcement of a CPO by contempt, which can result in jail time. Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1860 (2002).[3] In at least 14 States, as in the District of Columbia, courts or statutes have specifically upheld the right of private litigants to initiate contempt actions privately.[4] In Texas, for example, the private party may

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[3] These contempt actions, by necessity, are almost always criminal contempts. Because only sanctions which allow the contemnor to "purge" the contempt can be denominated civil contempt, *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 635 n.7 (1988), civil contempt is rarely applicable. The vast majority of CPO violations are neither purgeable nor remediable; they are past violations that require consequences to be imposed. Imposition of yet another "coercive" order (or agreement) is pointless when a violator has already ignored a formal court order.

[4] *See Olmstead v. Olmstead*, 284 S.W.3d 27, 28 (Ark. 2008); *Eichhorn v. Kelley*, 111 P.3d 544, 548 (Colo. Ct. App. 2004); *Gordon v. State*, 960 So.2d 31, 39 (Fla. Dist. Ct. App. 2007); *Gay v. Gay*, 485 S.E.2d 187, 188 (Ga. 1997); *In re Marriage of Betts*, 558 N.E.2d 404, 425 (Ill. App. Ct. 1990); *Long v. Hutchins*, 926 So.2d 556, 567 (La. 2006) (Brown, C.J., concurring); *Furtado v. Furtado*, 402 N.E.2d 1024, 1034 (Mass. 1980); *DeGeorge v. Warheit*, 741 N.W.2d 384, 392-393 (Mich. Ct. App. 2007); *State ex*

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file an enforcement motion with the state district court including the specific provision of the order sought to be enforced, the time, place, and manner of the violator's alleged violation, and the request for relief sought. Tex. Fam. Code Ann. § 157.002. And in other States, the process can vary by county.[5]

More recently, all 50 States have adopted a crime of "protection order violations," which enables prosecutors to treat such violations as a distinct crime. Epstein, *Procedural Justice*, *supra*, at 1860.

c. Despite this additional avenue for state enforcement, the "most serious limitation of civil protection orders" continues to be "widespread lack of enforcement." Finn & Colson, *supra*, at 3; *see also*

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rel. O'Brien v. Moreland, 778 S.W.2d 400, 405-407 (Mo. Ct. App. 1989); *Wilson v. Wilson*, 984 S.W.2d 898, 903-904 (Tenn. 1998), cert. denied, 528 U.S. 822 (1999); *Chen v. Stewart*, 123 P.3d 416, 423 (Utah 2005); Alaska R. Civ. P. 90(b); N.Y. CLS Family Ct. Act § 846 (2010); 23 Pa. Cons. Stat. § 6113.1. Amici are aware of another five states—Iowa, Maryland, Oklahoma, South Carolina and Utah—that use private criminal contempt to enforce CPOs, pursuant to general statutory contempt provisions or courts' inherent authority. *See* Battered Women's Justice Project, Survey of Statutes and Domestic Violence Advocates (2010), *available at* www.tinyurl.com/FLinterestedprosecutor (last visited Mar. 6, 2010).

[5] For instance, several Pennsylvania counties permit private criminal contempts. In one, the court rules specify that "[t]he unavailability of plaintiff's counsel shall not be grounds for the dismissal of the contempt action." Rules of Ct., Warren-Forest Ct. of Common Pleas, Thirty Seventh Jud. Dist. of Penn., R. L1903.6 (2005).

Kentucky Civil Protection Order Violation Study, *supra*, at 114 ("strong enforcement, especially for stalking victims, seemed to be lacking in this study"); Zlotnick, *supra*, at 1194 ("lack of enforcement is still cited as the principal weakness of protection orders"); *Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1511-1512 (1993) (enforcement by the criminal justice system has "received inadequate emphasis in many jurisdictions"). In a recent, in-depth study of CPO enforcement, the majority of protection order recipients indicated that the order's effectiveness was based on the perpetrator's fear of legal repercussions. The study concluded, "if protective orders are violated without consequences this fear would be eliminated." Kentucky Civil Protection Order Violation Study, *supra*, at 156.

3. Public enforcement is not an effective alternative to private criminal contempt proceedings

It is not true that CPOs can be effectively enforced with only the "wide variety of options" that prosecutors possess. *See* NACDL Br. 26 n.22. As discussed below, criminal enforcement of CPOs provides no substitute for private contempt enforcement. Not only do police and prosecutors lack the institutional capacity and, sometimes, the will to prosecute most CPO violations, private contempt enforcement is critical to effectuate the core purposes of a CPO: providing prompt intervention and giving the victim control.

a. Public enforcement is not reliable

Although the criminal justice system has made significant strides in its response to domestic violence, Sack, *supra*, at 1668-1678, it cannot be said (as petitioner's amicus contends, NACDL Br. 20-26) that the system has overcome its past legacy of neglect and acquiescence in this "private" crime. In particular, even though it is a crime in almost every State to violate a CPO, police response and public prosecution of such violations is still erratic and varies greatly by jurisdiction.

Thus, in a national study, more than 80% of those surveyed reported that police respond "slowly or ineffectively" to reports of protection order violations; 41.3% characterized the failure of police response as a "significant or very serious problem." Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163, 223-224 (1993). And when police do respond, they often refuse to make an arrest. *Id.* at 224. A more recent Boston study also reported the widespread reluctance of police to arrest for restraining order violations. Ptacek, *supra*, at 162 (detailing anecdotes of police failures to respond to violations). And, in 2009, the Kentucky Civil Protection Order Violation Study found that only 27.9% of reported CPO violations resulted in arrests. Kentucky Civil Protection Order Violation Study, *supra*, at 104.

Prosecutors also are often reluctant to respond to protection order violations. The national study cited above found that "[a]lmost three-fourths (70.9%) of [those surveyed] reported that prosecutors refuse to prosecute violations except in very limited circumstances." Kinports & Fischer, *supra*, at 228. This is consistent with amici's experience: In many States and counties, amici have found the local district attorneys to be reluctant or unable to prosecute CPO violations. This is true even in jurisdictions where the prosecution of domestic violence itself has improved. *See* Margaret M. Barry, *Protective Order Enforcement: Another Pirouette,* 6 HASTINGS WOMEN'S L.J. 339, 356 (1995) (commenting that even after criminalization of protection order violations, prosecutors were not prosecuting the new crime).[6]

b. Law enforcement views protection orders as civil matters

Although discouraging, reluctance on the part of many state prosecutors to prosecute violations of CPOs is hardly surprising. *See, e.g.*, *Gordon*, 960 So. 2d at 39 ("Although an indirect criminal contempt proceeding in a family law case is vitally important to the parties, such a case often has little interest to a professional prosecutor"). This reluctance stems in large part from the fact that—regardless of the

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[6] Where, as in the District of Columbia, only an arrest can initiate a prosecution, the lack of prosecution sometimes stems from a failure of police response. *See* pp. 12-13, 16-17 *supra*.

denomination of a contempt as "criminal"—the enforcement of a *civil* order shares few similarities with traditional crimes, procedures, and punishments. As one former domestic violence prosecutor has pointed out, "the criminal justice system will resist the complete criminalization of civil protection order violations. * * * Despite the wishes of * * * advocates, domestic violence does not behave like an 'ordinary' crime and prosecutors and police have legitimate grievances about being forced to treat it as such." Zlotnick, *supra*, at 1209-1210 (1995).

This is especially true where the violations do not involve physical contact or obvious physical violence. Ptacek, *supra*, at 163-164; Goldfarb, *supra*, at 1512. In such cases, it has been amici's experience that prosecutors often believe that it will be difficult to convince a judge or a jury that unwanted telephone calls or stay-away violations, although technically a crime for violating the order itself, should subject a defendant to a criminal conviction. As such, it is perhaps unsurprising that law enforcement generally views such violations as minor, inconvenient offenses, rather than real crimes requiring priority intervention.

But this trivialization of such protection order violations can sometimes be tragically mistaken. In domestic violence cases, purportedly less-serious violations of protection orders are often harbingers of severe or even lethal abuse. For example, in *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748 (2005), the police ignored a mother's repeated pleas to enforce

her protection order, and when the respondent took the children without permission in violation of the protection order, the children were then murdered. *Id.* at 751-754.[7] That case is not unique. *See, e.g.*, *Campbell v. Campbell*, 682 A.2d 272, 273 (N.J. Super. Ct. Law Div. 1996) (after police failed to arrest respondent who violated stay-away provision and merely escorted him from the premises, he returned and shot the victim); *Mastroianni v. County of Suffolk*, 91 N.Y.2d 198, 201-202 (N.Y. 1997) (victim stabbed to death after police failed to arrest husband—despite knowing he was visiting neighbors next door—after he violated order by entering her home and removing her furniture).

c. Law enforcement lacks the necessary resources

Police and prosecutors also lack the resources to address the high volume of CPO violations. *See, e.g.*, *Wilson v. Wilson*, 984 S.W.2d 898, 903 (Tenn. 1998) ("[d]istrict attorneys already have a heavy caseload" and "it is unrealistic to expect [them] to prosecute contempt actions arising from alleged violations of civil court orders"), cert. denied, 528 U.S. 822 (1999); *State ex rel. O'Brien v. Moreland*, 778 S.W.2d 400, 406 (Mo. Ct. App. 1989) (same). Indeed, as respondent and the District of Columbia have explained, it was

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[7] This Court's ruling that there is no federal constitutional remedy against the police in *Castle Rock* underscores the extreme difficulty of ensuring that police respond to these violations.

precisely the inability of the District of Columbia government to handle all CPO litigation that caused the legislature and courts to expressly endorse a private right of action both for filing protection orders and enforcing them through criminal contempts. *See* Resp. Br. 3-6; *Green v. Green*, 642 A.2d 1275, 1279-1280 (D.C. 1994). States today face the same—or worse—resource problems. Letter from Tiffany Carr, President & CEO, Florida Coalition Against Domestic Violence (Mar. 1, 2010), *available at* http://www.tinyurl.com/floridacoalition (last visited Mar. 6, 2010) ("recent severe funding cuts have resulted in [the loss of] * * * dedicated domestic violence units, and * * * [prosecutors in] contempt proceedings for injunction violations has decreased dramatically"); Letter from Laurie Schipper, Executive Director, Iowa Coalition Against Domestic Violence, at 2 (Feb. 25, 2010), *available at* http://www.tinyurl.com/iowacoalition (last visited Mar. 6, 2010) ("There are simply too many criminal contempt cases every year for county prosecutors to effectively handle alone[;] * * * county prosecutors' offices are small and underfunded[;] * * * [w]ithout independent enforcement by protected parties, many [CPO] violations would slip through the cracks unremedied.").

Thus, when police fail to make arrests for protection order violations, amici's District of Columbia lawyers regularly advise victims that they need not be dependent on the police; they can file their own motion for contempt, and seek to have the violator

held accountable and the court's order enforced. Indeed, this Court recommended the same. *Castle Rock*, 545 U.S. at 760 (noting that victim could have brought respondent back to court for contempt, even if police did not arrest). In this respect, a victim's ability to achieve legal relief *without* being dependent on the criminal justice system to take action is a significant (and intended) benefit of the CPO system. If private enforcement is undermined or eliminated, the assurance that CPOs will be enforced will disappear.

d. Private enforcement is critical to the effectiveness of protection orders

Even if public prosecution were fully available, the elimination of the right to enforce their own protection orders would be a profound loss to victims of abuse. Private criminal contempt empowers battered women by giving them choice and some control over the process. *See* Zlotnick, *supra*, at 1198. If enforcement is exclusively controlled by the State, the empowerment and control a CPO provides will be eviscerated. *See generally,* Elizabeth M. Schneider, BATTERED WOMEN AND FEMINIST LAWMAKING, 184-188 (2000) (describing loss of autonomy for battered women when relying on the State).

i. For instance, victims in private litigation may decide what violations to litigate (e.g., sexual abuse), what witnesses to offer (e.g., children or other relatives), and what remedies to request (e.g., jail sentence or not). Indeed, victims frequently seek to

withdraw their contempt motions in exchange for a modification of their CPO.[8] Victims can control none of these decisions, many of which may actually benefit the individual who violated the CPO, in a state-controlled prosecution.

More fundamentally, the victim's ability to take charge of a legal intervention sends an important corrective message to the abuser, whose purpose and modus operandi is to subordinate and control the victim. *See* Stark, *supra*, at 5. The ability to initiate and prosecute her own legal action is a powerful re-assertion of autonomy. Ptacek, *supra*, at 165 ("Many of the women stressed that by taking [CPO] action, they had forced a shift in the balance of power."). Thus, the typical dynamic of abuse is profoundly disrupted when the system performs its "loud-speaker" role on the victim's behalf. *See* Kuennen, *supra*, at 49.

Criminal prosecutions (or litigation "on behalf of" the State), by contrast, are not in the victim's control, and are sometimes decidedly in conflict with their needs or desires.[9] In immigrant and minority

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[8] In fact, in the vast majority of motions for contempt in the District of Columbia, victims withdraw, dismiss, or otherwise resolve their motion prior to the court ruling on the issue of contempt. *See* http://www.tinyurl.com/DCcontempt (last visited Mar. 6, 2010).

[9] Subpoenaing and even incarcerating victims who are reluctant to testify has become more common in the wake of the Supreme Court's shift in confrontation clause jurisprudence. *See* Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA.

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communities, state-controlled criminal prosecutions can be especially problematic. Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 17-18 (1999).[10] But for many victims, a criminal trial which they neither choose nor control is an ordeal that, rather than empowering the victim, can cause "re-victimization * * * [that] can thwart the survivor's efforts to regain control over her life and move past the abusive experience." *Id.* at 17.

ii. Moreover, in stark contrast to the delayed criminal process, "contempt is faster and faster is better." Zlotnick, *supra*, at 1199. The CPO system was created to provide a speedy response to abuse. *See Green*, 642 A.2d at 1279 (statutory procedures are designed "to expedite the application and if necessary, the enforcement of CPOs"). Because any delay in the enforcement of a CPO can lead to potentially tragic results, rapid response is critical. "[D]eterrence is generally more potent when a quick punishment follows an infraction." Zlotnick, *supra*, at 1201-1202;

L. REV. 747, 749 (2005) (*Crawford v. Washington* devastated domestic violence prosecutions and increased prosecutors' coercion of victims to testify).

[10] The risk of deportation of the abuser is a deterrent to seeking legal protection for some immigrant victims. Epstein, *Effective Intervention*, *supra*, at 17. For the African-American community, racial tension between the community and the police makes reliance on the criminal justice system even more undesirable. *Id.* at 17-18.

Klein & Orloff, *supra*, at 1126 (private initiation of contempt actions allows victims "to obtain swift enforcement of civil protection orders and thereby secure their immediate safety"). Indeed, faced with such violations, courts have recognized that speed is necessary to prevent potentially fatal escalation. *See, e.g.*, *Synder v. Synder*, 629 A.2d 977, 981 (Pa. Super. Ct. 1993) ("The Emergency nature of the judicial process [in contempt actions] * * * requires th[e] Court act swiftly to prevent continued abuse and deal with contempt situations in an expeditious manner lest the violation giving rise to the contempt become a criminal action for homicide." (citation omitted)).

A private contempt enforcement action is ordinarily concluded within a month after it is commenced; criminal misdemeanor prosecutions for contempt violations can take up to 12 months. *See* Zlotnick, *supra*, at 1199-1203, 1209 n.248.

iii. Finally, CPO enforcement is eviscerated when a prosecutor waives the State's own right to enforce that order, as happened in this case. Here, the lengthy prosecution of petitioner for his initial violent acts against respondent was not resolved until *after* he viciously assaulted her again (in violation of the CPO she obtained after the first attack). Pet. App. A.iv-v; J.A. 26-30, 56-60, 72. At that point, a plea bargain between petitioner and the United States Attorney's Office waived the *government's* right to prosecute petitioner for his second attack when it resolved the first. J.A. 28-30. Had the victim retained no independent right to enforce her CPO, all

enforcement of the order would have been entirely abandoned.[11] These kinds of trade-offs are inevitable when a State prosecutor, rather than the victim, resolves a violation of the victim's *civil* protection order.

4. Private enforcement of civil protection orders "in the name and pursuant to the power of the United States" is not a viable solution

a. Notwithstanding the narrow question presented, petitioner's opening brief makes clear that he is challenging more than "in whose name" and "in whose power" the prosecution for criminal contempt can occur. Pet. Br. 45-46, 53-59; NACDL Br. 8-20. Petitioner has instead raised the far broader question of whether a private party may *ever* use criminal contempt proceedings. Not only is petitioner wrong on the merits, his broadened argument is significant (and fatal), because as respondent makes clear, petitioner expressly waived that issue below. Resp. Br. 44-45, 51 n.18.

b. On the narrow question actually presented, however, a regime allowing a private party to seek criminal contempt sanctions for violations of a CPO, but only in the name and pursuant to the authority of

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[11] Double jeopardy protections attach regardless of whether the private victim or the government prosecutes a criminal contempt. *United States v. Dixon*, 509 U.S. 688, 696 (1993).

the government, would be incapable of coherent implementation.

First, it is unclear whether and to what extent a private party who was required to prosecute "in the name and pursuant to the power of the United States" would be subject to the duties and responsibility of a state prosecutor. These obligations include, among others, the disclosure of exculpatory and impeachment evidence and information, *see Brady v. Maryland*, 373 U.S. 83, 86 (1963); the requirement to ensure the accused has been apprised of the right to, and had adequate opportunity to obtain counsel, *see* Am. Bar Ass'n Model of Prof'l Conduct R. 3.8(b); the necessity to refrain from making extrajudicial comments that may harm the defendant, *see id.* at R. 3.8(f); and the overarching obligation to be "a minister of justice," *id.* at R. 3.8 cmt. 1. This confusion concerning the applicable procedures would be compounded by the fact that many litigants seeking to enforce their CPOs proceed pro se, while abusers such as petitioner are automatically appointed counsel. D.C. Super. Ct. Dom. Viol. R. 12(e)(2).

Second, the continued assertion by petitioner and his amicus that a private *interested* litigant can, at her own initiative, file and litigate a criminal contempt action, but only *on the United States's behalf* is a legal fiction that fails of its own incoherence. If the private litigant acts "in the name" and "pursuant to the power" of the United States, it is difficult to see how a private litigant could direct the litigation, be represented by her own lawyer, and assume neither

the powers nor obligations of the State, yet somehow represent and bind the State, while the State retains no control over the litigation.[12] Alternatively, if the private litigant's decisions and conduct were subject to the control of the United States, then the legal fiction is nothing more than a thinly disguised repudiation of privately prosecuted criminal contempt actions.

c. Nor is the appointment of a disinterested private prosecutor a viable solution. It is clear that States and courts have "[n]o such funds" for the appointment of disinterested prosecutors. *State ex rel. O'Brien v. Moreland*, 778 S.W.2d 400, 407 (Mo. Ct. App. 1989); *Wilson*, 984 S.W.2d at 903 ("unlike the federal system, there is no fund in Tennessee from which to compensate private counsel appointed to prosecute criminal contempt actions"); *cf. Musidor, B.V. v. Great American Screen*, 658 F.2d 60, 65 (2d Cir. 1981) ("There is no [federal] fund out of which to pay other [disinterested] counsel."); Joan Meier, *The Right to a Disinterested Prosecutor of Criminal*

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[12] In *Green v. Green*, the District of Columbia Court of Appeals expressly held that the private-contempt plaintiff maintained a normal attorney-client privilege and was subject to the court rules governing private litigants, *not* those governing public prosecutors. 142 A.2d at 1282. While asserting below that he was not seeking reversal of *Green*, petitioner never explained how, even with these procedures, a private litigant could be "standing in the shoes" of the United States. Petition for Reh'g 1.

Contempt: Unpacking Public and Private Interests, 70 WASH. U. L. Q. 85, 90 n.26 (1992).

Even if such funds did exist, however, such an approach would not lead to the effective enforcement of CPOs. The imposition of a "disinterested" prosecutor rather than an attorney for the victim would result in all the limitations described above. Moreover, a "private" but "disinterested" lawyer could not provide the critical role of a victim's attorney, including legal counseling, advocacy support and empowerment, and safety planning. Without this kind of advocacy and support accompanying their enforcement, CPOs' potential to provide a transformative legal intervention for victims of abuse is greatly reduced.[13]

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[13] In fact, in some States, presumably to avoid reliance on an "interested prosecutor," judges act as both the prosecutor and the decision maker *themselves*. Battered Women's Justice Project, Survey of Statutes and Domestic Violence Advocates at 1 (Florida) (2010), *available at* www.tinyurl.com/FLinterested prosecutor (last visited Mar. 6, 2010). Such a practice is, in amici's view, far more troubling and likely to compromise fairness to the defendant, than is private criminal contempt litigation. Cf. *Young*, 481 U.S. at 820 (Scalia, J., concurring) (fearing that allowing judges whose order was violated to initiate contempt proceedings could create "the most tyrannical licentiousness") (citation omitted); Meier, *supra*, at 113-115 & nn.125-137 (discussing the lack of impartiality when judges themselves initiate contempt cases even where the underlying order was unconstitutional, and the executive declined to prosecute).

B. Private Criminal Contempt Proceedings Do Not Infringe Rights Of Those Who Violate Protection Orders

Petitioner contends that he has a "right to be [criminally] prosecuted by the government," Pet. Br. 58, and that prosecution by a private citizen violates due process, Pet. Br. 47-60.

As respondent explains, however, the Constitution provides no guarantee of public prosecution in criminal contempt proceedings, and due process has not been offended in this case. Resp. Br. 58-63. And, as amici explain below, there is no truth to petitioner's hyperbolic claim that CPOs and their enforcement create some sort of abusive "private 'criminal code'" of virtually "unbounded" scope. Pet. Br. 52. To the contrary, CPOs and their enforcement through private contempt proceedings are replete with all applicable procedural protections that this Court requires to ensure "fundamental fairness." *Lassiter v. Department of Soc. Servs. of Durham County, N.C.*, 452 U.S. 18, 24-25 (1981) (discussing the general precepts of "fundamental fairness.").

Indeed, petitioner's argument travels on well-trodden ground and has been repeatedly rejected. In addition to being repeatedly rebuffed by the District of Columbia courts, *see* Pet. App. A.xiv-xv; *Green*, 642 A.2d at 1280-81, numerous other state courts have also considered, and rejected, challenges to the private criminal contempt enforcement of protection (or other) orders. *See, e.g., Olmstead v. Olmstead*, 284

S.W.3d 27, 28 (Ark. 2008); *Eichhorn*, 111 P.3d at 548 (Colorado); *Gordon*, 960 So.2d at 39 (Florida); *In re Marriage of Betts*, 558 N.E.2d at 425 (Illinois); *DeGeorge*, 741 N.W.2d at 392-393 (Michigan); *Moreland*, 778 S.W.2d at 405-407 (Missouri); *Wilson*, 984 S.W.2d at 903-904 (Tennessee). This Court should not overthrow these reasoned judgments and the state legislative mandates, particularly in a case in which petitioner never afforded the court below the opportunity to fully consider the issues he now presses.

1. Criminal contempt is not identical to an ordinary criminal prosecution and requires no more than the due process protections that were provided in this case

At bottom, petitioner complains that he has the right to be prosecuted by someone not seeking to vindicate her personal rights. Pet. Br. 57 ("due process concerns are minimized by the fact that control of the prosecution rests with the government"). While amici acknowledge that the neutrality of the prosecutor may be an important value in an actual criminal prosecution, even there it has never been elevated to the status of a due process right. Moreover, criminal contempt, while possessing certain criminal law characteristics and requiring greater due process protections than civil contempt, has never been treated as a crime in all respects.

a. This Court has repeatedly held that contempt proceedings "are sui generis—neither civil actions nor

prosecutions for offenses, within the ordinary meaning of those terms—and exertions of the power inherent in all courts to enforce obedience, something they must possess in order properly to perform their functions." *Myers v. United States*, 264 U.S. 95, 103 (1924); *see also Frank v. United States*, 395 U.S. 147, 152 (1969); *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911). Indeed, this Court in *Young* underscored the unique nature of contempt by holding that a court's fundamental need to "vindicate its own authority" trumps the power of the executive branch to exercise prosecutorial discretion which is "essential" to disinterested justice for ordinary crimes. *Young*, 481 U.S. at 796, 801, 813-814. Thus, although criminal contempt proceedings require that the individual being held in contempt be afforded numerous due process protections designed to ensure a fair trial—all of which petitioner was afforded here—the Court has never held that such proceedings are intrinsically the same as an ordinary criminal prosecution.

b. Violations of CPOs, like violations of any civil order, are fundamentally different from ordinary crimes. Unlike in the ordinary criminal context, the individual victim's interest in ensuring her own civil order is enforced predominates over any public interest. Meier, *supra*, at 127 ("While a criminal prosecution upholds laws that society has determined are essential to a civil society, a contempt proceeding enforces an order that never would have become 'law' but for the individual efforts of private citizens on

behalf of their own particular interests."); *Gordon*, 960 So.2d at 39 ("Although the public has an interest in an order entered in a family law or domestic relations case, this interest is far outweighed by the interest of the party seeking the enforcement or protection of the order."). Of course, the party's personal interest in enforcement is also consistent with "the public interest in vindication of the court's authority." *Young*, 481 U.S. at 804. Indeed, courts depend upon the beneficiary of the order to bring a violation of that order to their attention. *See, e.g.*, *Eichhorn*, 111 P.3d at 548 (recognizing that when non-compliance occurs outside the direct hearing of the court, private litigants are needed to bring violations to the court's attention).

For this reason, criminal contempt has more in common with civil contempt than with an ordinary criminal prosecution. Unlike an ordinary criminal prosecution, contempt, at bottom, is the means employed by a court to ensure compliance with that court's civil order. Although criminal contempt contains punitive elements, so too does civil contempt when it uses harsh sanctions to coerce compliance. *See United States v. United Mine Workers of Am.*, 330 U.S. 258, 303-304 (1947) (explaining that a civil contempt sanction can "coerce the defendant into compliance with the court's order"). Civil contempt can thus involve substantial jail time. *See, e.g.*, *Shillitani v. United States*, 384 U.S. 364, 370 n.6 (1966) (classifying as civil contempt, and upholding "a determinate [two-year] sentence which includes a purge clause").

c. These similarities between criminal and civil contempt do not change the accused's entitlement to the full panoply of due process protections in any criminal contempt proceeding. Indeed, this Court and the District of Columbia have appropriately assured accused criminal contemnors of all the key procedural protections normally afforded criminal defendants, including the right to defense counsel, *Cooke v. United States*, 267 U.S. 517, 537 (1925); the proof beyond a reasonable doubt standard, *Gompers*, 221 U.S. at 444; trial by jury for serious contempt actions, *Bloom v. Illinois*, 391 U.S. 194, 198 (1968); and protection against double jeopardy, *United States v. Dixon*, 509 U.S. 688, 696 (1993); *see also In re Wiggins*, 359 A.2d 579, 581 (D.C. 1976) (recognizing foregoing due process protections and the right to confront the witnesses against him); D.C. Super. Ct. Dom. Viol. R. 9(b) (strict evidentiary requirements, right to present and rebut evidence); *id.* at R. 12(d), (notice); *id.* at R. 12(e) (right to counsel and appointment of counsel for defendant; right against compulsion to testify or give evidence); and 13(a) (right to appeal). But, especially given all these procedural protections to ensure fairness, the identity of the moving party raises no valid due process concerns. *See* Resp. Br. 58-63; *see also* 13 C.J.S. *Contempt* § 82 (1917) ("[I]t is a matter of no importance who institutes the proceedings for contempt, since the alleged contemnor is not prejudiced in his defense by the particular mode in which the facts are brought to the attention of the court").

2. *The assumption that private contempt proceedings will be vengeful or abusive is inconsistent with the dynamics of domestic violence*

a. Petitioner suggests that private prosecutors can be expected to seek only vengeance, whereas public prosecutors will weigh the "public interest" and disinterestedly "do justice." Pet. Br. 58-59. But this notion of private vengeance does not comport with the empirical evidence and amici's extensive experience.

In fact, it is well known that domestic violence victims are typically markedly ambivalent about prosecution, and are far less likely than a prosecutor to seek harsh sanctions. *See* pp. 22-23 *supra;* Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747, 768 (2005) (battered women are more likely to avoid participation in criminal trials or recant their accusations than any other crime victims). Victims of abuse are easily intimidated or worn down by the process; many ultimately withdraw from the legal process. Barry, *supra* at 354-356 (describing one such case); p. 23 n.8 *supra* (District of Columbia data on withdrawal of contempt motions). There is no reason to believe that, when the victim is represented, the private lawyer will attempt to abuse the judicial process in contempt proceedings. *Wilson*, 984 S.W.2d at 904 (a private lawyer does not "detract from the integrity of the judicial process" because "a litigant's private attorney is no less likely to seek justice and no more likely to be influenced by improper

motives than a public prosecutor or a disinterested private attorney").

And, as discussed above (*see* pp. 22-24 *supra*), many battered women's goals—often including avoidance of criminal trials and a preference for civil alternatives—are surely preferable to a defendant, but are not available to a prosecutor who is limited to seeking criminal sanctions. Meier, *supra*, at 110 ("The assumption that * * * private prosecutors are overzealous, singleminded, and inflexible[ ] is distorted at best. * * * Injured parties have a wide array of needs and desires * * * . * * * [P]rivate parties are in fact *more* likely to seek flexible resolutions of their disputes than are public prosecutors.").

Moreover, even in privately initiated contempt proceedings, courts—not the parties—control whether the proceeding goes forward, which allegations to adjudicate, and any punishment. In the District of Columbia, the court even supervises and restricts discovery under the court rules. D.C. Super. Ct. Dom. Viol. R. 8 (providing that all discovery in privately prosecuted criminal contempt proceedings must be approved by the Court); *id.* at R. 14 (prior judicial authorization is required before any subpoena requested by an unrepresented private party may issue). Other jurisdictions provide similar procedural protections for the parties. In Tennessee, for example, the court plays a gatekeeping role to such proceedings, so that a private contempt proceeding cannot proceed until the judge reviews the application of the private party following an order to show

cause. Tenn. R. Crim. P. 42(b). And, as in any legal proceeding, sanctions are available against an attorney who files a frivolous criminal contempt application. *Wilson*, 984 S.W.2d at 904.

b. The concerns that animated this Court's decision in *Young* are not present in the enforcement of CPOs. *Young* involved a complex commercial dispute between two businesses where one party was granted the full investigative powers of the United States Attorney "to employ the full machinery of the state in scrutinizing any given individual." *Young*, 481 U.S. at 805-806, 814. Amici agree that in that context—where a well-financed corporation has obtained the power to conduct broad-ranging prosecutorial power including wiretaps, plea bargaining, and the ability to grant immunity to one civil adversary while continuing its civil litigation against another—private prosecution of criminal contempt is troubling.

The CPO enforcement context, however, is not comparable. In these cases, as courts have recognized, the balance of power favors the accused, not the movant. Victims seeking to enforce CPOs are not appointed "special prosecutors" and possess none of the powers of the State. *See Wilson,* 984 S.W.2d at 904 ("private attorneys prosecuting criminal contempt in Tennessee are not ordinarily clothed with all the powers of a public prosecutor"). Indeed, it has been amici's experience that victims often even lack representation altogether, while those who violated the CPO are automatically appointed counsel. Thus,

the District of Columbia Gender Bias Task Force, as well as the District of Columbia Superior Court, have "expressed concern over the inherent imbalance in CPO contempt hearings," in recognition of the common phenomenon of pro se CPO movants litigating against represented CPO violators. Barry, *supra*, at 354 n.53.[14]

Finally, the kinds of "financial and tactical conflicts of interest" presented in *Young* simply do not arise in CPO contempt proceedings. *Green*, 642 A.2d at 1279. These proceedings are aimed at ensuring safety and minimizing ongoing friction, but involve no damage awards. Accordingly, state courts have repeatedly concluded that CPO contempt proceedings do "not present the potential for discovery abuses and financial conflicts of interest the *Young* Court addressed." *Id.* at 1279-1280; *see also Gordon*, 960 So.2d at 40 ("Criminal contempt proceedings in a family case are typically directed at offensive conduct, without the pecuniary aspect of the trademark infringement proceedings at issue in [*Young*].").

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[14] *See* D.C. Super. Ct. Dom. Viol. R. 8(b) & cmt. (noting that court approval of discovery in privately prosecuted cases is intended to protect private prosecutors from being "overburden[ed]" by (universally represented) CPO violator's discovery requests).

3. State prosecution of criminal contempt proceedings does not provide any cognizable benefit to the accused

Petitioner's urging that only the State should be permitted to enforce CPO violations puts him at odds with the traditional fairness concerns underlying due process protections for defendants. Such protections ordinarily seek to level the playing field by constraining state power and enhancing defendants' procedural rights vis-à-vis the State. But here, petitioner's so-called "right" would require that the "full machinery of the State," instead of the minimal powers of a private litigant, be brought to bear against him.[15] Given that accused contemnors already receive all procedural protections that ensure the fairness of the process, the only conceivable benefit to a defendant of prosecution by the State rather than a private litigant would be the possibility that the State will be less likely to bring an enforcement action at all (as in this case). This interest—in the non-enforcement of civil court orders—is not a valid one, and surely does not rise to the level of a due process right. *See* Meier, *supra*, at 112-113 (*Young's* permitting courts to initiate contempt proceedings when prosecutors decline

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[15] This effect would be even more pronounced in the many jurisdictions like the District of Columbia that maintain a no-drop policy—i.e., prohibiting dismissal of the action at the request of the victim—for prosecution of domestic violence.

demonstrates that there is no cognizable individual right to prosecutorial discretion).

CONCLUSION

For the foregoing reasons, and those in respondent's brief, the Court should affirm the judgment.

Respectfully submitted,

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MARCH 8, 2010

APPENDIX A

National and District of Columbia Organizations

The **Domestic Violence Legal Empowerment and Appeals Project (DV LEAP)** was founded in 2003 by one of the nation's leading domestic violence lawyers and scholars. DV LEAP provides a stronger voice for justice by fighting to overturn unjust trial court outcomes, advancing legal protections for victims and their children through expert appellate advocacy, training lawyers, psychologists and judges on best practices, and spearheading domestic violence litigation in the Supreme Court. DV LEAP is committed to ensuring that the Supreme Court understands the realities of domestic violence and the law when deciding cases with significant implications for domestic violence litigants. DV LEAP has previously co-authored amicus briefs to the United States Supreme Court in *Town of Castle Rock, Colo. v. Gonzalez*; *Davis v. Washington*; *Hammon v. Indiana*; *Giles v. California; United States v. Hayes*; *and Abbott v. Abbott*. DV LEAP is a partnership of the George Washington University Law School and a network of participating law firms.

The **Battered Women's Justice Project – Domestic Abuse Intervention Programs, Inc., Duluth, MN ("BWJP")** is a national technical assistance center that provides training and resources for advocates, battered women, legal system personnel, policymakers, and others engaged in the justice

system response to domestic violence. The BWJP promotes systemic change within community organizations and governmental agencies engaged in the civil and criminal legal response to domestic violence, in order to hold these institutions accountable for the safety and security of battered women and their children. The BWJP is an affiliated member of the Domestic Violence Resource Network, a group of national resource centers funded by the Department of Health and Human Services and other support since 1993. The BWJP also serves as a designated technical assistance provider for the Office on Violence Against Women of the U.S. Department of Justice. In an effort to promote more safe and just results for women and their children, the BWJP works at state, national and international levels to engage court systems to respond effectively to the needs of battered women and to fashion safe outcomes that hold batterers accountable. Civil protection orders, and the ability of battered women to seek their own enforcement for violations of such, represent a powerful response to the ongoing and terroristic nature of domestic violence. Whether due to poor response by law enforcement, indifference by prosecutors or simply lack of resources, battered women must often rely on their own efforts to enforce CPO provisions and ensure their safety. A decision in this case that eliminates that ability of private enforcement of CPOs by petitioners essentially eviscerates the promises of protections created by the process, resulting in a hollow remedy for thousands of battered women and their children.

Legal Momentum is the nation's oldest legal defense and education fund dedicated to advancing the rights of all women and girls and ending violence against women. Founded in 1970 as NOW Legal Defense and Education Fund, Legal Momentum was instrumental in drafting and passing the Violence Against Women Act in 1994 and its subsequent reauthorizations which seek to redress the historical inadequacy of the justice system's response to domestic violence. Legal Momentum also represents victims of domestic violence who suffer housing and employment discrimination related to the violence. The organization has participated in numerous *amicus curiae* briefs to the Supreme Court in cases supporting the rights of victims of domestic violence, sexual assault and other forms of gender-motivated violence, including *Davis v. Washington* and *Hammon v. Indiana*, 547 U.S. 813 (2006); *Giles v. California*, 128 S. Ct. 2678 (2008); and *Abbott v. Abbott*, No. 08-645 (S. Ct., argued Jan. 12, 2010).

The **National Network to End Domestic Violence, Inc. (NNEDV)** is a non-profit organization incorporated in the District of Columbia in 1995. The mission of NNEDV is to create a social, political, and economic environment in which violence against women no longer exists. A network of state domestic violence coalitions, representing over 2,000 member programs nationally, NNEDV serves as the voice of battered women and their children and those who provide direct services to them. NNEDV has a long history of working at the local, state, and national

levels to promote a strong criminal justice response to domestic violence, including reducing homicides by removing firearms from convicted batterers. NNEDV was instrumental to Congressional enactment and implementation of the Violence Against Women Acts of 1994, 2000, and 2005, and co-chairs the current national Violence Against Women Act reauthorization efforts. NNEDV also provides technical assistance, training, and public education to advocates, professionals, and individuals who encounter battered women in their work and communities. NNEDV has provided advice and expertise on domestic violence issues affecting battered women and their children to judges, attorneys, and other justice system personnel on the importance of effective enforcement of protection orders in order to keep victims of domestic violence and their children safe from abuse.

Domestic Violence Report (DVR) is a multidisciplinary newsletter that is widely distributed throughout the nation to 2,000 domestic violence programs and advocates, judges, lawyers, therapists, doctors, clergy, academics, police, probation officers and others interested in ending domestic violence. Since October of 1995, it has published every two months and covers all of the many aspects of domestic violence, and is primarily concerned with promoting the safety of domestic violence victims and the children in homes where domestic violence occurs.

The newsletter editors and contributors and advisory board, who include lawyers, healthcare providers, criminologists, police, academics, researchers and

battered women's advocates, work with and train judges, health care providers, law enforcement, policy-makers, and domestic violence service providers throughout the nation and assist them in creating and drafting appropriate responses for domestic violence. DVR is very concerned with the effectiveness and enforceability of protection orders, which are a critical element of an effective legal response to domestic violence.

Break the Cycle is an innovative national nonprofit organization whose mission is to engage, educate, and empower youth to build lives and communities free from domestic and dating violence. Break the Cycle achieves this mission through national efforts to affect public policy, legal systems and support systems through training, technical assistance and advocacy. Further, Break the Cycle works directly with young people in the District of Columbia, ages 12 to 24, providing them with preventive education, free legal services, advocacy and support. Break the Cycle envisions a world in which young people are empowered with the rights, knowledge and tools to achieve healthy, nonviolent relationships and homes.

Break the Cycle's early intervention legal services offer sensitive, confidential and free legal advice, counsel and representation to young people who are experiencing abuse in their relationships or homes in protective order cases and related family law matters. Our 15 years of experience providing legal support to young victims of domestic abuse guide our support of this brief. Through our direct legal services, we

understand the importance of protection orders as a critical tool in protecting the safety of the victim and providing justice. The issuance of the order demonstrates a judicial finding that the victim is at risk for continuing abuse and, also, demonstrates the support of the judiciary for the rights of the victim to live free from violence. However, the order of protection is useless in protecting life and health if it is not given respect and enforced by the justice system. Unfortunately, law enforcement and prosecution resources are often limited, leading to delayed or absent prosecutions of some protection order violations. This sends a message to both the abuser and the victim that the protection order lacks the full conviction and support of the government and can leave victims at even greater risk of violence than existed prior to issuance of the protection order. It is essential that victims be permitted to bring protection order violation to the court for swift adjudication of the abuser's contempt. A decision in this case that eliminates that ability of private enforcement of CPOs by petitioners essentially eviscerates the promises of protections created by the protection order process. As such, we join in this amicus (www.breakthecycle.org).

The **District of Columbia Coalition Against Domestic Violence (DCCADV)**, founded in 1986 and incorporated in the District of Columbia, is a nonprofit organization serving as the professional association for the District's domestic violence service providers and is the primary representative of battered women and their children in the public policy arena.

Members of DCCADV share the goal of ending domestic violence through community education, outreach, public policy development, and services for survivors. DCCADV is extremely interested in assuring that the judicial system adequately protects the rights of domestic violence victims, including furthering victims' rights and abilities to seek enforcement of their own CPOs.

Women Empowered Against Violence (WEAVE) is a non-profit organization in Washington, DC that works closely with adult and teen survivors of relationship violence and abuse, providing an innovative range of legal, counseling, economic and educational services that lead survivors to utilize their inner and community resources, achieve safety for themselves and their children, and live empowered lives. Through our legal services program, WEAVE has assisted thousands of domestic violence survivors seeking to protect themselves by obtaining Civil Protection Orders (CPOs) and contempt enforcement of those orders against their abusers.

Scholars and Judge

Elizabeth M. Schneider is Rose L. Hoffer Professor of Law at Brooklyn Law School and a national and international scholar and expert on domestic violence and the law. She is the author of the prize-winning book Battered Women and Feminist Lawmaking (Yale University Press, 2000), co-author of Domestic Violence and the Law: Theory and

Practice (Foundation Press. 2d. 2008 (with Cheryl Hanna, Judith G. Greenberg and Clare Dalton), one of the leading law school casebooks on domestic violence, and has written many articles on the subject. She has been teaching Domestic Violence and the Law for close to twenty years and also teaches courses on civil procedure, federal civil litigation, and women and the law. She has trained many judges and lawyers in this country and around the world on legal issues involving domestic violence. She is deeply concerned with the questions presented in this case and the need for enforcement of civil protective orders to protect battered women, and the importance of retaining an avenue for private enforcement of protective orders.

David M. Zlotnick is a Professor of Law and Associate Dean for Academic Affairs at Roger Williams University School of Law. He has taught Criminal Law & Criminal Procedure for over fifteen years on several law faculties (Roger Williams, Washington College of Law, and Stetson University). His scholarship encompasses domestic violence, constitutional law, and sentencing. Before entering the academy, he was a federal prosecutor in Washington, D.C., and argued *Foster v. United States*, 598 A.2d 724 (1991) before the D.C. Court of Appeals, the domestic violence case in *United States v. Dixon*, 509 U.S. 688 (1993), which was the last time that this Court had to confront central issues arising out of the enforcement of civil protection orders.

Marjory D. Fields, is a retired New York State Family Court Judge and Supreme Court Justice. She presided in cases of spouse and intimate partner violence and abuse and child abuse and neglect for 16 years. Prior to becoming a judge, Fields was the managing attorney of the matrimonial law unit at Brooklyn Legal Services Corporation B for 15 years, where she and her team represented 1500 abused low income wives a year in divorce and child custody proceedings. Fields traveled throughout the United States training Legal Services lawyers to marshal evidence for domestic violence divorce cases. She testified before Congress and State Legislatures in support of stronger legal remedies and protection for abused women and their children. She drafted new laws enacted in most States. From 1979 to 1989, Fields was co-Chair of the New York Governor's Commission on Domestic Violence, working to improve laws and government policy to provide protection for domestic violence victims and their children. Fields retired from the Court in August 2002 and returned to work for improved protection for victims of domestic violence. She has seen first-hand over 38 years the need for private remedies for victims of domestic violence, whose protection order enforcement cases are often overlooked or rejected by government prosecutors.

Regional and Local Programs

The **California Partnership to End Domestic Violence (CPEDV)** is the federally recognized state

domestic violence coalition for California, with over 150 member organizations and individuals across the entire state. Like other Domestic Violence Coalitions throughout the United States and territories, CPEDV is rooted in the battered women's movement and the values that define this movement, including working toward social justice, self-determination, and ending the oppression of women. As the unified voice for California's domestic violence agencies, CPEDV provides statewide leadership on public policy, offers training and technical assistance to domestic violence service providers and promotes public awareness through community outreach efforts. The California Partnership to End Domestic Violence promotes the collective voice of a diverse coalition of organizations and individuals, working to eliminate all forms of domestic violence. As an advocate for social change, we advance our mission by shaping public policy, increasing community awareness and strengthening our members' capacity to work toward our common goal of advancing the safety and healing of victims, survivors and their families.

CPEDV's mission and work are focused on protecting the safety of domestic violence victims and their children and holding batterers accountable. Civil protection orders, and the ability of battered women to seek their own enforcement for violations of such, represent a powerful response to the ongoing and terroristic nature of domestic violence. Whether due to poor response by law enforcement, indifference by prosecutors or simply lack of resources, battered

women must often rely on their own efforts to enforce CPO provisions and ensure their safety. A decision in this case that eliminates that ability of private enforcement of CPOs by petitioners essentially eviscerates the promises of protections created by the process, resulting in a hollow remedy for thousands of battered women and their children. Accordingly, CPEDV has a compelling interest in this case and joins the amicus curiae brief filed by the Domestic Violence legal Empowerment and Appeals Project (DV LEAP) et al.

The **Florida Coalition Against Domestic Violence (FCADV)** serves as the statewide membership association representing Florida's 42 certified domestic violence centers. In 2004, the Governor and Florida Legislature designated FCADV in statute as the organization responsible for administering state and federal funding earmarked for domestic violence core services. In this role, FCADV serves as the entity responsible for ensuring quality of services for domestic violence survivors and their children. FCADV also serves as the primary representative of survivors of domestic violence and their children in the public policy arena. FCADV's 42 certified domestic violence center members, more than half of which are dual-certified sexual violence programs, share the goal of ending domestic, sexual, and dating violence and stalking through community education, public policy, and services for survivors and their children. Through its Legal Clearinghouse Program, FCADV contracts with legal services attorneys statewide to

represent survivors in seeking civil injunctions for protection, a key component in protecting survivors and their children. It is critical, however, that survivors have the option of private enforcement of these injunctions because a lack of resources often prevents state prosecution of violations. Without such enforcement, batterers are not held accountable, increasing the danger to survivors and their children who have accessed the court system for protection.

The **Kansas Coalition Against Sexual and Domestic Violence (KCSDV)** is a non-profit organization incorporated in 1988. Its member programs are domestic violence and sexual assault programs located in large and small communities across the state that work with victims directly. KCSDV has extensive expertise on the physical, sexual, emotional and economic dangers women and their families face on a daily basis as the result of domestic violence, sexual assault and stalking. The organization's Protection Order Project, in existence since 2006, focuses on training, issuance and enforcement of protection orders in Kansas. Protection orders are an important tool for ending and intervening in sexual assault, domestic violence and stalking. In 2008, victims filed for over 12,400 protection from abuse and protection from stalking orders in Kansas. KCSDV has published the Kansas Protection Order Manual, a pocket card for law enforcement on enforcement of Kansas protection orders, an on-line Guided Interview for victims (www.kcsdv.org/pfa.html), and has responded to hundreds of technical assistance calls on protection

orders from victims, advocates, law enforcement officers, prosecutors, judicial branch staff, and other professionals from across the state. The enforcement of protection orders is a seminal issue for the safety of victims and accountability of perpetrators of domestic violence, sexual assault and stalking.

KCSDV respectfully submits this statement of interest to assist the Court and join in the brief being submitted by domestic violence organizations and advocates across the nation.

The **Kentucky Domestic Violence Association** is a nonprofit organization founded in 1981 and incorporated in the State of Kentucky. It is dedicated to advocating for safety and justice for battered women and their children, and provides comprehensive services to families through fifteen shelter programs located across the state. The Kentucky Domestic Violence Association is extremely concerned about preserving the right of victims to enforce civil protective orders on their own behalf. A recent research study has shown that 65% of protective orders are successful in preventing further acts of abuse. However, in those cases where the respondent violates the order, the ability of battered women to seek their own enforcement for such violations represents a powerful response to the ongoing and terroristic nature of domestic violence. For a variety of possible reasons, whether due to poor response by law enforcement, indifference by prosecutors or simply lack of resources, battered women must often rely on their own efforts to enforce CPO provisions and ensure their

safety. A decision in this case that eliminates that ability of private enforcement of CPOs by petitioners essentially eviscerates the promises of protections created by the process, resulting in a hollow remedy for thousands of battered women and their children, making them reliant on the state to take action. To most fully protect victims and their children from further acts of abuse, the preservation of the ability of petitioners to pursue enforcement of their orders on their own is critical.

We therefore join the *amicus* brief submitted by Domestic Violence Legal Empowerment and Appeals Project on behalf of Respondent, Wykenna Watson.

Legal Services of Eastern Missouri, Inc. (LSEM) provides high quality civil legal assistance and equal access to justice for income eligible people living in 21 counties of Eastern Missouri, including St. Louis. LSEM joins many other agencies and institutions working to build coordinated community responses to domestic violence. LSEM provides no-cost legal services to domestic violence survivors in a broad array of family law and civil cases. In addition, LSEM provides educational trainings and presentations to survivors, advocates for domestic violence survivors, attorneys, students, and community members. In 1956, LSEM was incorporated as a non-profit corporation. Over 25 years ago, LSEM committed to representing survivors of family violence. Every year, LSEM receives thousands of requests for assistance.

LSEM is extremely concerned about the case of *Robertson v. Watson* because the United States Supreme Court's decision will have significant implications for survivors of domestic violence in Missouri and throughout the nation. Missouri's Order of Protection laws permit survivors of interpersonal violence to file motions to hold abusers in contempt of court if the abuser violates the terms of the protection order. In addition, Missouri courts decide indirect criminal contempt actions brought against offenders who have failed to attend batterer intervention programs. When criminal penalties are at issue, Missouri courts ensure that the criminal contempt defendants receive the due process protections that other criminal defendants receive. The effectiveness of protection orders depends largely on how well they are enforced by the judiciary. Without the ability to enforce the order through contempt proceedings, survivors will not obtain adequate protection from abusive non-compliant offenders. Many times, there would be no adequate remedy for violations of protection orders unless the survivors could seek to enforce the orders through private action. Offenders may routinely violate orders if they believe they will not be held accountable. Eliminating survivors' ability to litigate contempt proceedings would weaken the protection order process and would threaten the safety of survivors of domestic violence.

Legal Voice (formerly known as the Northwest Women's Law Center) is a regional non-profit public interest organization based in Seattle that works to

advance the legal rights of all women through litigation, legislation, education, and the provision of legal information and referral services. Since its founding in 1978, Legal Voice has participated as counsel and as *amicus curiae* in cases throughout the Northwest and the country and is currently involved in numerous legislative and litigation efforts. Legal Voice has been a regional leader in combating all forms of violence against women, with an emphasis on domestic violence. Legal Voice has long advocated for efforts to create and improve civil protection orders for domestic violence survivors, and has a strong interest in this case because it concerns the ability of survivors to ensure effective enforcement of civil protection orders against their abusers.

The **Legal Aid Foundation of Los Angeles (LAFLA)** has been the frontline law firm for poor and low income people in Los Angeles, California, since 1929. The lawyers of LAFLA's Family Law Unit provide direct legal assistance in civil cases involving domestic violence/intimate partner abuse, child abduction and concealment and sexual assault. Family Law Unit staff members offer access to the community through courthouse-based walk-in clinics, representation in state court at the trial and appellate level and through community education and outreach. Within the last five years, LAFLA's Family Law Unit lawyers have successfully obtained three state appellate court decisions that reversed improper trial court orders that harmed abuse survivors and put their children at risk. In addition to the provision

of direct legal services, LAFLA attorneys effect systemic change by serving on local, state and national committees and organizations, by serving as trainers on topics dealing with domestic violence/ intimate partner abuse, and by providing comment to law makers seeking our expertise on issues impacted by proposed legislation and rule changes.

The **Pennsylvania Coalition Against Domestic Violence ("PCADV")** is a private non-profit organization working at the state and national levels to eliminate domestic violence, secure justice for victims, enhance safety for families and communities, and create lasting systems and social change. The first domestic violence coalition in the nation, PCADV was established in 1976 when a handful of grassroots women's groups in the state joined together to lobby for legal protections and to develop a network of services for victims of domestic violence. The Coalition has grown to a membership of 61 organizations across Pennsylvania consisting of shelters, hotlines, counseling programs, safe home networks, legal and medical advocacy projects, and transitional housing projects for victims of abuse and their children. Over the past three decades, these programs have offered safety and refuge to close to 2 million victims and their children from every corner of the commonwealth.

Batterers characteristically exert power and control over their victims. A protection order is one step by a victim to regain power and autonomy. Pennsylvania's Protection From Abuse Act (Act) is a vanguard

measure for the advance protection of victims of domestic violence. Enforcement and prosecution of protection order violations varies from county to county in Pennsylvania and is left to each of the sixty-seven elected district attorneys to determine whether to prosecute. The Act provides a victim with a protection order with the authority to file a private criminal complaint against the defendant for a non-economic violation of any provision of the protection order. If a protection order is violated the private criminal contempt provides a way for the victim to enforce their own order and obtain the full scope of protections the law has afforded them. Such a provision supports a victim's empowerment and self-esteem by returning some measure of control to the victim. Without the private criminal contempt mechanism for enforcement, the full promise of the law goes unfulfilled for victims.

Sanctuary for Families is the largest non-profit agency in New York State dedicated exclusively to serving victims of domestic violence and sex trafficking and their children. Sanctuary served more than 10,000 victims last year with shelter, counseling and legal advice and representation in a wide range of family law matters, including orders of protection, custody, divorce and visitation. Sanctuary's lawyers and clients rely heavily on the safety and peace of mind that such orders provide and are deeply concerned about the dangers the victims would face if the orders could not be enforced by the litigants without the involvement of the overburdened public

prosecutors' offices. For that reason, we respectfully join others in signing on to the amicus brief herein on behalf of the respondent.

Southeast Tennessee Legal Services is a non-profit organization created more than three decades ago to meet the legal needs of those unable to afford an attorney in Hamilton County, Tennessee. We now have a long and successful history of collaboration with all of the domestic violence service providers in the ten (10) counties of Southeast Tennessee where we also administer a STOP grant. We serve as the volunteer training site for interns from the University of Tennessee Legal Assistant Studies Program and Chattanooga State Community College, both located in Chattanooga. Southeast Tennessee Legal Services provides civil legal services to victims of violence in Hamilton, Bradley, Polk, Meigs, McMinn and other counties through legal advice and representation, including orders for temporary relief, child custody disputes and support, spousal support, and equitable property division; including negotiations, trials, legal briefs, and (in appropriate cases) appeals to higher courts in divorce proceedings. We also provide advice, representation and referral concerning housing, employment or other matters arising out of domestic violence and necessary to aid the safety of the victim as well as publication of brochures providing general legal guidance to victims of domestic violence, guiding them through the entire legal terrain they are likely to encounter as they attempt to escape their abusers and seek safety.

The Women's Law Project (WLP) is a non-profit public interest legal center dedicated to improving the legal and economic status of women through litigation, public policy development, public education and individual counseling. With offices in Philadelphia and Pittsburgh, Pennsylvania, WLP engages in extensive advocacy challenging gender discrimination in employment, education, insurance, and in family matters relating to custody, support, domestic violence and divorce. Assisting women who are victims of domestic violence, in particular, has been a major focus of both WLP's telephone counseling service, which handles thousands of inquiries a year, and policy advocacy, which includes efforts to improve the domestic violence response of Philadelphia's city government, law enforcement entities, and courts. Following a two year study, the WLP published *Justice in the Domestic Relations Division of Philadelphia Family Court: A Report to the Community* (April 2003), setting forth its findings regarding the many challenges domestic violence victims face when they seek protection orders in the Philadelphia court system. WLP actively pursues advocacy to address the challenges identified in its report. WLP is committed to ending violence against women and to improving the response of the legal system to victims of domestic violence.

AMICUS CURIAE BRIEF

No. 08-6261

IN THE

Supreme Court of the United States

JOHN ROBERTSON,

Petitioner,

v.

UNITED STATES *ex rel.* WYKENNA WATSON,

Respondent.

On Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF FOR *AMICI CURIAE* FAMILY LAW JUDGES, PRACTITIONERS & SCHOLARS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

Amici Curiae are nonprofit legal service organizations practicing family and matrimonial law, private family and matrimonial attorneys, law professors, law school clinical programs, and former judges with wide experience in family and matrimonial law (hereinafter referred to as family law) as it is practiced across the fifty states and across an economically and culturally diverse population. Practitioner and judicial *amici* are familiar with how orders in the family law context are fashioned and how they operate in practice. Academic *amici* have conducted years of scholarly research on this area of the law. *Amici* are well positioned by reason of their training, research and experience to address the importance of preserving the ability of judges and the parties to family disputes to enforce civil court orders through criminal contempt without having to obtain the participation of prosecutors, whether governmental or specially appointed private persons. All *amici* have an interest in ensuring the Court is fully and accurately informed about the day-to-day realities in family courts as well as the scholarly research surrounding the issues at hand.[1]

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[1] Names and Statements of Interest of the individual *amici* are set forth in Appendix 1. Letters consenting to the filing of *amicus curiae* briefs are on file with the Clerk of the Court. No counsel for a party authored the brief in whole or in part and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amicus curiae* or their counsel made a monetary contribution to its preparation or submission.

QUESTION PRESENTED

Whether an action for criminal contempt in a congressionally created court may constitutionally be brought in the name and pursuant to the power of a private person, rather than in the name and pursuant to the power of the United States?

SUMMARY OF THE ARGUMENT

The private pursuit of criminal contempt by an interested party is of critical importance in family disputes because of the equitable responsibility of courts issuing such orders in their affirmative role of protecting children; the character of the orders such a court issues, including their mandatory nature, their duration, and their requirement of on-going compliance; and the emotional forces often driving those to whom they are directed. At times, civil contempt is simply not enough to vindicate a court's authority and protect the legally recognized rights of the beneficiary of the order in addition to the public interest in enforcement of particular orders. Moreover, government prosecutorial resources are insufficiently available to achieve adequate compliance with voluminous family law orders whose enforcement falls outside the organizational focus of a governmental prosecutor and the alternative of appointing a private disinterested prosecutor is neither necessary nor viable. In light of the foregoing, there is no reason to extend the requirement in *Young*[2] of a disinterested prosecutor to family law disputes.

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[2] *Young v. U.S. ex. rel. Vuitton et Fils S.A.*, 481 U.S. 787, 804 (1997).

ARGUMENT

I. PERMITTING PUNITIVE SANCTIONS IN PRIVATELY LITIGATED CONTEMPT ACTIONS IS NECESSARY TO THE ADEQUATE ENFORCEMENT OF FAMILY LAW ORDERS

Civil contempt alone is an insufficient remedy to vindicate the interests either of courts or of litigants in the enforcement of orders relating to family law. This reality is reflected in the practice of numerous states, the historical underpinnings of the judiciary's affirmative role to protect children, and the nature of the judicial process in these matters. The private pursuit of criminal contempt allows for the enforcement of court orders which would otherwise be ignored. A constitutional bar to such suits would negatively impact the public interest as well as the private interests of often vulnerable parties. It would also frustrate the development of effective approaches to cases involving family dysfunction that may require punitive enforcement, and the credible threat thereof, to achieve the court's behavior-altering objective.

A. The Duty of the Court to Protect Children's Welfare Makes Enforcement of Such Orders of Particular Public Import

Family courts in the United States trace their history to England's Chancery Courts. During the mid-eighteenth century, the Chancery Court obtained exclusive jurisdiction over matters

involving children.[3] The Chancery Court exercised *parens patriae* jurisdiction over children, a power it derived from the Crown's interest in protecting those who had no legal rights.[4] United States Courts have long acknowledged that States have a "traditional and transcendent interest in protecting the welfare of children."[5]

Orders in family law matters often relate to the welfare of children. These orders demonstrate that the judiciary takes responsibility for outcomes in the family law context and does not merely play the role of the "neutral adjudicator" referenced in *Young*.[6] This affirmative and protective role makes the ability of the court to achieve compliance with its orders in this area of particular public importance.

The consequences of flouting court orders related to children—whether for child support, for appropriate educational placement or for protection against an abusive parent or guardian—are especially serious and irreparable. And, if there are children in the family, almost every order in the

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[3] Danaya C. Wright, *The Crisis of Child Custody: A History of the Birth of Family Law in England*, 11 Colum. J. Gender & L. 175, 189 (2002); 4 Joseph Story, *Commentaries on Equity Jurisprudence, As Administered in England and America* 637-38 (13th ed. 1886).

[4] John Seymour, *Parens Patriae and Wardship Powers: Their Nature and Origins*, 14 Oxford J. Legal Stud. 159 (1994); Wright, *supra* note 2, at 189.

[5] *See, e.g., Maryland v. Craig*, 497 U.S. 836, 837 (1990) (citations omitted).

[6] *Young*, 481 U.S. at 816.

family law context will affect the welfare of those children. For example, determining which parent will foster the child's education, religious upbringing, and physical and emotional growth are all decisions that impact the child's welfare, and are reduced to written orders. The judge is the only government actor with supervisory and monitoring responsibilities over the many actors with duties to children, including both institutional participants such as child protective and foster care agencies as well as individual parents and guardians.

B. Because of their Nature and Duration, Some Family Law Orders May Be Impervious to Civil Contempt

The family law context typically requires the court to manage family relationships over an extended period of time and in considerable detail. Child support, visitation, and custody orders can last until children reach the age of 18 or 21, or in the case of spousal support, until a former spouse dies or remarries. These orders, moreover, most often require repeated conduct, which results in weekly or monthly opportunities for violation. Those violations may be persistent and have significant negative effects on the whole family, yet be impervious to civil contempt. This problem can be exacerbated by family dysfunction.

1. Custody and Visitation Orders

Violations of custody and visitation orders are sometimes impervious to civil contempt remedies

as they are often cured after damaging non-compliance but before the other parent can take the matter to court. For instance, a parent may repeatedly and consistently return children several days late from overnight visitation,[7] causing the children to miss vital school time, and causing the other parent, and likely the child, significant anxiety. A father who consistently drank alcohol during his visitation with his son is another example. Despite repeated admonishments by the court his drinking continued until caught on tape by a private investigator. It was only after spending five days in jail that he finally stopped drinking during his visits.[8]

In these kinds of situations "by the time the injured parent seeks judicial relief, the children are 'where they should be' under the terms of the parenting plan. In these circumstances, the current imposition of a fine or jail sentence cannot, as a practical matter, be used by the court to coerce the compliant behavior that has already occurred."[9] Suspension of visits as a remedy is generally undesirable because it punishes the children as much as the recalcitrant parent, and supervision of visitation

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[7] *See, e.g., Wilson v. Freeman*, 402 So. 2d 1004, 1007 (Ala. Civ. App. 1981), *infra* note 10.

[8] Email exchange with Elizabeth Green Lindsey of Davis, Matthews and Quigley P.C. (Feb. 23, 2010) (on file with NYLAG).

[9] Margaret M. Mahoney, *The Enforcement of Child Custody Orders by Contempt Remedies*, 68 U. Pitt. L. Rev. 835, 868 (2007).

may be prohibitively expensive or inappropriate for older children. Several courts have concluded that criminal contempt remedies are the most effective ones for ongoing violations of these types of orders.[10]

Persistent violations of visitation orders are also impervious to compensatory remedies, another reason criminal contempt, while rare compared to the overall number of violations, is so important in this arena. "In many cases, an injunctive order was entered in the first place because the individual rights protected by the order could not be easily quantified or protected by a monetary award."[11]

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[10] *See, e.g., Bruzzi v. Bruzzi*, 481 A.2d 648 (Pa. Super. Ct. 1984); *Fields v. Fields*, 240 S.E.2d 58, 60 (Ga. 1977) ("With respect to short periods of visitation the most practical means of enforcement is by use of criminal contempt as the visitation time period has usually expired before the court can act."); *Wilson v. Freeman*, 402 So. 2d at 1007 ("There is a serious question as to whether a *civil* contempt proceeding is an effective remedy for the violation of visitation rights.") (emphasis added); *Boggs v. Boggs*, 692 N.E.2d 674, 678 (Ohio Ct. App. 1997) ("[W]e believe that the court found appellant in criminal contempt for his 'repeated and blatant' exposure of the children to his paramour. Because . . . there is no way to purge past violations of said order, we believe that the court did not err in failing to provide a purge mechanism . . . ."); *In re Marriage of King*, 721 P.2d 557, 559 (Wash. Ct. App. 1986) ("It may be argued that the remedies afforded by the civil contempt statute are inadequate in this [visitation violation] case. . . . We recognize the potential for an individual so inclined, to frustrate the authority of the court, particularly if she is given repeated opportunities to purge the contempt in spite of previous disobedience of the court's lawful orders.") (dicta).

[11] Mahoney, *supra* note 9, at 872.

There is no clear way to calculate actual damages for the children's educational and social losses because of missed school time.[12] Monetary awards may be of limited deterrence to a person of limited means to pay a judgment while a person of substantial means may well be willing to bear the risk of repetitive litigation knowing the burden that such litigation imposes on the aggrieved party.

2. Child Support Orders

In this very case, the court below noted that in the District of Columbia a comparable regime for party-initiated criminal contempt enforcement of child support orders parallels the order of protection regime directly at issue here.[13] By statute, the District allows "[t]he Mayor or a party who has a legal claim to child support" to initiate a criminal contempt action for failure to pay the support by filing a motion in the civil action in which the support order was established.[14] Thus, if this Court bars party-initiated criminal contempt actions as

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[12] There is much social science research attesting to the negative impact of children missing school—either because a parent kept the child beyond a visitation date by which he was supposed to be returned or because of an inconvenient foster care placement. Jane Sundius & Molly Farneth, *Missing School: The Epidemic of School Absence* (Open Society Institute-Baltimore 2008), *available at* http://www.soros.org/initiatives/baltimore/articles_publications/articles/truancy_20080317/whitepaper1_20080919.pdf.

[13] *In re Robertson*, 940 A.2d 1050, 1058 (D.C. 2008).

[14] D.C. CODE § 46-225.02 (2009).

an enforcement tool for orders of protection it will be barring enforcement of child support orders as well. This would be highly unfortunate because the need for criminal enforcement of child support orders without the intervention of government or specially appointed prosecutors is compelling.

As detailed in Section II, States are unable to collect vast amounts of unpaid child support despite the financial incentives offered by Congress. The sheer amount owed indicates numerous ongoing violations of orders and thus the need in some of these cases for the use of criminal contempt.[15]

Delay in the payment of child support can lead to irreparable injury to children. For example, an eviction that results from lack of receipt of child or spousal support can cause young children to lose not only their home, and the permanence and stability it brings, but potentially a change in schools and, in the confusion of crisis, the loss of personal belongings—a favorite teddy bear or security blanket—that can never be replaced. In this context, when orders may require payments for years, a nonpayor may fall into a habit of late

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[15] *See also Missouri ex rel. O'Brien v. Moreland*, 778 S.W.2d 400, 406-07 (Mo. Ct. App. 1989) ("If the offending party has assets, a civil contempt action *may* be sufficient to encourage obedience of the court's decree. When the offending party is indigent, civil contempt proceedings are virtually meaningless. Indirect criminal contempt proceedings, including the authority to incarcerate, gives the trial court the power to enforce its order.") (emphasis added).

payment or payment only after repeated court threats. The purpose of criminal contempt remedies—whether by fines paid directly to the court or by additional jail time—in such a situation is to move the nonpayor into future compliance through the realization that such behavior will have serious consequences.

Enforcement of other financial orders in matrimonial actions is similarly difficult and also in need of the remedy of criminal contempt. The New York State Courts Matrimonial Commission reported in 2006 that enforcement of orders in divorce cases was among the areas most in need of reform.

> [T]he Commission urges a change in the rules and substantive law pertaining to the enforcement of court orders. The Commission heard substantial testimony from litigants, attorneys and the judiciary that non-compliance with court orders largely contributed to the increased delay and cost of divorce. Moreover, the litigation process can be delayed or stymied by one party's refusal to cooperate in the process. To ameliorate the deleterious effects of one's failure to comply with court orders . . . the Commission . . . recommends that Domestic Relations Law § 245 be amended to provide Supreme Court judges with the same authority to enforce orders by [criminal] contempt now enjoyed by Family Court judges.[16]

[16] State of New York Unified Court System Matrimonial Commission, *Report to the Chief Judge of the State of New*

In short, criminal contempt, while rare, is an indispensible tool for judges in family matters to enforce their orders.

C. A Disproportionate Number of Family Law Litigants Are Highly Willful Actors Driven by Strong Emotion and Therefore Are Not Responsive to Civil Contempt Remedies

The intensely interpersonal subject matter of family law actions, perhaps more consistently than any other area of law, leads litigants to sacrifice their own financial interests and liberty in favor of other considerations. Emotions, either well-meaning or based on vindictiveness, cause some litigants to ignore family law based orders. Reminding litigants of the possibility of punishment is an important judicial tool for deterring violations.

Most importantly, the plight of the family law judge, who often must deal with dysfunctional family relationships and who is seeking a problem-solving, behavior-altering result in the most trying of circumstances, deserves sympathetic attention. By necessity, the family law judge bears the special burdens of enforcing not only prohibitory but also mandatory injunctive relief. That judge needs to be able to say: "Next time you come into this court

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York (2006), *available at* http://www.courts.state.ny.us/reports/matrimonialcommissionreport.pdf (citing N.Y. Fam. Ct. Act § 454, which in subsection 3(a) gives N.Y. Family Court judges the power to imprison willful violators of child support orders for up to six months).

having violated my order, you had better bring your toothbrush." That direct threat and its deterrent value is not achieved by threatening to call the prosecutor or to appoint a private person as a special prosecutor. Street knowledge that the prosecutor lacks the resources and/or interest, and that the Court lacks the funds to compensate the special prosecutor, will render the Court's words entirely hollow.

Punishment of actors through criminal contempt also has the positive effects of expressing society's disapproval and sending a deterrent message to others, regardless of whether the contemnor himself is moved.

The distorted motivations for litigation of some parties to family law cases have a significant impact on the number of family law cases that are brought.

> Studies of custody disputes indicate that fathers who battered the mother are twice as likely to seek sole physical custody of their children than are nonviolent fathers, and they are more likely to dispute custody if there are sons involved. . . . [T]hey are likely to continue to threaten and harass the mother with legal actions. Battering fathers also are three times as likely to be in arrears in child support and are more likely to engage in protracted legal disputes over all aspects of the divorce.[17]

[17] American Psychological Association Presidential Task Force on Violence and the Family, *Violence and the Family* 40 (1996).

Parties with vindictive motives are more likely to bring affirmative suits of their own and to be in violation of court orders, resulting in the need for more enforcement actions. While this is arguably true in any area of law, when manifested in family law, which produces multiple orders requiring repeated, affirmative conduct over long periods of time, the intransigent family litigant has the opportunity to cause dramatically more need for the court's enforcement powers than a similar litigant in a different area of law. Every enforcement tool needs to be available, including criminal contempt.

Child support, as already noted, is a particular area in which states have found it necessary to develop more aggressive enforcement mechanisms, including criminal statutes and the increased use of judicial contempt.[18] In this context, the issue of circumvention is also present. In *United States v. Ballek*, the Ninth Circuit held that the federal Child Support Recovery Act is equally violated by "refusal to work . . . motivated by sloth, a change of lifestyles or pursuit of new career objectives."[19]

The failure to effectively enforce child support can also have collateral consequences in an

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[18] Teresa A. Myers, *National Conference of State Legislators, Case in Brief Courts Uphold Criminal Penalties for the Failure to Pay Child Support* (1999), *available at* http://www.ncsl.org/IssuesResearch/Human Services/CaseinBriefCourtsUpholdCriminalPenaltiesfo/tabid/16445/Default.aspx.

[19] 170 F.3d 871, 875 (9th Cir. 1999).

emotionally charged family law arena. Child support issues that are not firmly addressed can escalate. Seeking child support often prompts violence and retaliatory filings of child custody or visitation petitions.[20] Courts have recognized this dynamic of escalation and developed responsive protocols.[21] Congress has also recognized the potential for retaliatory violence as a basis for the promulgation of the Family Violence Option ("FVO") in 1996.[22] The FVO allows states to exempt battered women from many of the requirements of Temporary Assistance for Needy Families ("TANF"), including the obligation to identify the father to facilitate a State child support action.[23]

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[20] Judy Reichler & Liberty Aldrich, *Child Support Protocol: A Guide for Integrated Domestic Violence Courts* 1, 6-7 (Center for Court Innovation 2004); Nisha Patel & Vicki Turetsky, *Safety in the Safety Net: TANF Reauthorization Provisions Relevant to Domestic Violence*, 1-2 (Center for Law and Social Policy year 2004), *available at* http://www.clasp.org/admin/site/publications_archive/files/0167.pdf; American Psychological Association Presidential Task Force on Violence and the Family, *Violence and the Family* 39 (1996).

[21] Reichler, *supra* note 20.

[22] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (*codified as amended at* 42 U.S.C. § 602(a)(7) (1999)).

[23] Shriver Center on Poverty Law, *"Woman View"* Vol. 11, Issue 12, May 21, 2008.

II. GOVERNMENT RESOURCES ALONE ARE INSUFFICIENT TO PROVIDE NECESSARY CRIMINAL CONTEMPT ENFORCEMENT OF FAMILY LAW ORDERS

A. The Sheer Number of Family Law Cases Militate in Favor of Private Enforcement of Those Orders

Family law has broad application and family law disputes are likely unique in their pervasiveness. By 1985, every state but New York allowed for no-fault divorce. That has meant an increase in the number of divorces and an increase in the number of adults and children who are party to litigation involving family law.[24] In addition, divorce cases are highly likely to produce further litigation after the divorce is over. In one study of divorcing families in Massachusetts, 41% of the families with children in the study had returned to court to ask for modification or enforcement of some aspect of the court's financial, custody, and visitation decisions within two years of the divorce becoming final.[25]

An examination of data from a few states demonstrates the significance and impact of family law cases on states' trial court dockets. In Maryland, nearly forty-six percent (127,974)

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[24] Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 Ind. L.J. 775 (1997).

[25] Amy Koel *et al.*, *Patterns of Relitigation in the Postdivorce Family*, 56 Journal of Marriage & Family 265, 269 (1994).

of the 278,511 total filings in the trial court of general jurisdiction involve family and juvenile cases. In Nebraska, family law cases amount to fifty-eight percent of the state's total trial court caseload. In Nevada, forty-nine percent of the statewide trial court caseload involves family-related cases.[26] In 2008, 190,075 custody/visitation petitions, 305,954 support petitions, and 54,569 family offense petitions were filed in New York City alone.[27]

The high percentage of civil litigation consisting of family law matters, combined with the high number of mandatory orders that family cases produce, results in an extraordinary number of orders that must be enforced. While only a small percentage of those cases will require criminal contempt remedies, because of the high proportion of civil litigation composed of family law, the number of such cases in absolute terms will still be significant. There simply are not enough resources at the state level to provide appropriate and needed criminal enforcement if private litigants are foreclosed from doing so.

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[26] Barbara A. Babb, *Reevaluating Where We Stand: A Comprehensive Survey Of America's Family Justice Systems*, 46 Fam. Ct. Rev. 230 (2008) (footnotes omitted).

[27] New York State Unified Court System Annual Report 2008, *available at* http://www.courts.state.ny.us/reports/annual/pdfs/UCSAnnualReport2008.pdf.

B. Even Where Public Resources Have Been Allocated, Child Support Enforcement is Abysmal

The failure of State and local governments to initiate necessary criminal contempt proceedings to enforce family court orders is evidenced by the astronomical amount of child support arrears owed nationwide.[28] Recognizing that child support is "not an area of jurisprudence about which this country can be proud," Congress, in 1975, passed Title IV-D of the Social Security Act.[29] In passing this legislation, Congress noted that thousands of unserved child support warrants had accumulated in many jurisdictions where traffic infractions often were given higher priority than support cases. Under Title IV-D, the states must comply with federal guidelines regarding child support; the penalty for noncompliance is the reduction or termination of federal matching funds.[30] In 1992, over five billion dollars in child support were still going unpaid in the United States, forcing Congress

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[28] U.S. Department of Health and Human Services, Administration for Children and Families, Office of Child Support Enforcement, *Fiscal Year 2006 Annual Report to Congress* (2006), *available at* http://www.acf.hhs.gov/programs/cse/pubs/2009/reports/annual_report (hereinafter, "Office of Child Support Enforcement FY 2006 Annual Report to Congress").

[29] Social Services Amendments of 1974, Pub. L. No. 93-647, § 101(A), 88 Stat. 2337 (1975).

[30] Lisa Stamm, *Section 1983 And Title IV-D Of The Social Security Act: In Pursuit Of Improved Child Support Enforcement*, 60 U. Cinn. L. Rev. 221, 222 (1991).

to enact the Child Support Recovery Act.[31] And in 1998, the Deadbeat Parents Punishment Act creating additional federal crimes was enacted in a further attempt to ameliorate the problem.[32]

The federal Office of Child Support Enforcement was created with the goal of remedying the dearth of enforcement of child support orders for recipients of public assistance by funding state agencies that, among other things, establish support obligations and collect support payments from individuals.[33] Yet, despite the federal allocation of funds specific for this purpose, the enforcement rate for child support is abysmal.[34] As of September 2006, States reported that the total national unpaid child support debt that has accumulated since the program began in 1975 is $105 billion."[35] In California, the amount of arrears owed in fiscal year 2006 was a staggering $19,187,770,046; in Texas it was $9,260,200,751; and in Florida it was $5,128,716,969.[36] In the past twenty years nearly half of the state courts and 11 federal circuit courts of appeal have heard cases

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[31] Pub. L. No. 102-521, 1992 U.S.C.C.A.N. (106 Stat. 3403) 2909.

[32] Pub. L. No. 105-187, 112 Stat. 618-619 (1998).

[33] Social Services Amendments of 1974, § 101(A).

[34] *See* Office of Child Support Enforcement FY 2006 Annual Report to Congress.

[35] *Id.*

[36] *Id.*

regarding criminal violations of child support orders.[37]

Indigent litigants make up a large percentage of contemnors; however, as discussed above, there are many high net worth individuals who do not pay.[38] *Amici* have seen numerous examples of judges, high profile attorneys, doctors, and other professionals who go to great lengths to avoid paying support orders.

A bar to private criminal enforcement mechanisms of child support orders would, due to the magnitude of the arrears, call for a vast increase in public resources and this increase is highly unlikely to be forthcoming.

C. Appointment of an Independent Private Special Prosecutor is Neither Necessary nor Viable

The appointment of an independent private prosecutor is not a viable solution. State and local governments that lack the resources to assign the requisite number of government prosecutors to these cases will *a fortiori* lack the resources to compensate private independent prosecutors. State courts have pointed out that, unlike the federal system, no funds at the State level compensate private counsel appointed to prosecute criminal

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[37] *Id.*

[38] *See* Elaine Sorensen *et. al.*, *Assessing Child Support Arrears in Nine Large States and the Nation*, The Urban Institute (July 11, 2007).

contempt actions.[39] The *Moreland* court also indicated that "[t]he potential for criminal contempt charges to arise in the State court system is far greater that in the Federal system," particularly in the context of family law cases that will most likely be handled by the states.[40] Requiring additional or substitute procedures would therefore impose "tremendous fiscal and administrative burdens" on the states, something a number of courts have been unwilling to do.[41]

Moreover, referring criminal contempts to an independent public or private prosecutor undermines the trial court's interest in compliance with its own orders because the referral creates delay and uncertainty. Family law judges should have the opportunity to apply the commonly accepted premise of criminal justice that punishment is more effective when imposed swiftly and consistently.

Judges are therefore more likely to deter violations of repetitive orders like visitation schedules and child support by using swift, certain punishment for violation of those orders when

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[39] *Gordon v. Florida*, 960 So. 2d 31, 40 (Fla. Dist. Ct. App. 2007); *Moreland*, 778 S.W.2d at 406-07; *Wilson v. Wilson*, 984 S.W.2d 898, 903 (Tenn. 1998), *cert. denied*, 528 U.S. 822 (1999).

[40] 778 S.W.2d at 406 (citing statistics).

[41] *Wilson*, 984 S.W.2d at 903; *see also Gordon*, 960 So.2d at 39 ("To require the appointment of an independent prosecutor in all cases would inject delay and additional expense into proceedings where litigants are often of limited means.").

necessary. The inherent delay and uncertainty of referral to an independent prosecutor reduces the deterrent effect of the criminal contempt sanction and thereby reduces the Judiciary's ability "to vindicate its own authority without complete dependence on other Branches."[42]

In the family law context, the participation of a governmental or private special prosecutor in criminal contempt proceedings is not necessary from a fairness perspective. First, in all likelihood the use of criminal contempt will be in the context of petty criminal contempt not triable to a jury under *Bloom v. Illinois*.[43] This means that the judge will have complete control of the outcome just as he or she does in the case of civil contempt. Second, the facts establishing the violation of the order and the willfulness of that violation are likely to be demonstrated by the course of the repeated appearances of the parties that are commonplace in the family law context. Third, there is nothing unfair in having the court play a more inquisitorial role in establishing the facts that warrant criminal sanctions in those cases where the relevant witnesses and documents are before it. Fourth, while the independent prosecutor may be less zealous than an overly vindictive private party, the Judge can easily cut short any adverse consequences of overzealousness by declining summarily to entertain the application.

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[42] *Young*, 481 U.S. at 796.

[43] 391 U.S. 194 (1968).

D. Mandating the Appointment of a Disinterested Prosecutor Risks Foreclosing Effective Redress for Vulnerable Populations

By denying private parties the right to bring contempt actions, the Court risks silencing vulnerable populations. This Court has held that the Due Process Clause requires the States to afford certain litigants a "meaningful opportunity to be heard" by removing obstacles to their full participation in judicial proceedings.[44] Allowing private parties to draw the Court's attention to contumacious behavior is a practical way to give individuals a meaningful opportunity to participate in matters of the greatest importance to them.[45]

Other arms of government have made clear their lack of interest in enforcing these orders. In New York City, it is the policy of the New York Police Department not to enforce custody or visitation provisions in court orders despite the fact that

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[44] *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) ("Within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard" in its courts).

[45] Although the public has an interest in an order entered in a family law or domestic violence case, the interest of the party seeking the enforcement or protection of the order is of at least equal importance. A litigant's interest in receiving child support or being free from physical harm or harassment is pressing, real and extraordinarily significant. *See Gordon*, 960 So. 2d at 39. Nothing in this brief is meant to lessen the importance of that interest.

custodial interference is a violation of the New York Penal Code[46]:

> Due to the civil nature of a custody decree, a police officer should not attempt to enforce its provisions. A parent or guardian who is found violating the decree's provisions will not be arrested. . . . A party involved in a custody dispute should only be arrested when there is probable cause to believe that an offense other than a violation of the custody decree has occurred (i.e., violation of an existing order of protection, custodial interference, endangering the welfare of the child).[47]

Police frequently regard visitation violations as not being within their jurisdiction, mission or interest to enforce. They have a mission to ensure public safety and have policies against enforcing orders they deem "civil in nature."[48]

Likewise, prosecutors have an institutional disinterest in orders regarding private parties. It is unrealistic to expect prosecutors to pursue all contempt actions arising from alleged violations of civil court orders. As a Florida District Court of

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[46] N.Y. Penal L. §§;135.45, 135.50 (1965).

[47] John A. Morrison, *Child Custody Disputes*, Office of the Deputy Commissioner (NYPD)–Legal Matters Legal Bureau Bulletin Vol. 19 No. 1 (March 1989). This practice remains in effect.

[48] *Id.*

Appeal noted in *Gordon*, "[a]lthough an indirect criminal contempt proceeding in a family law case is vitally important to the parties, such a case often has little interest to a professional prosecutor."[49] This disinterest results in part from the fact that it is not in the organizational mission of prosecutors to pursue such cases. In addition, prosecutors lack the time, the resources, and in some cases the will to prosecute transgressors of civil domestic relations orders.

Criminal contempt proceedings initiated by the aggrieved party may well be the most effective remedy in these situations to prevent them recurring, and only the interested parties will likely file them.

Amici are all too aware of the identified noncompliance in the family law area. These persistent violations demonstrate a lack of respect by recalcitrant violators and erode the ability of courts to protect the rights of continually aggrieved victims. The judiciary currently has the appropriate powers to protect their authority and those rights, which powers should not be eviscerated by a constitutional ruling from this Court.

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[49] 960 So. 2d at 39; *see also Wilson*, 984 S.W.2d at 903 ("It is unrealistic to expect district attorneys to prosecute contempt actions arising from alleged violations of civil court orders. District attorneys already have a heavy case load prosecuting violations of the general criminal laws.").

III. *YOUNG* DOES NOT BAR PARTY-INITIATED CONTEMPT ENFORCEMENT IN FAMILY LAW DISPUTES.

In *Young*, this Court held that an interested private party could not seek criminal contempt for violation of an order issued in trademark litigation and that a disinterested private prosecutor would have to be appointed by the court. The Court rejected the argument that a government prosecutor would have to be appointed as this would put the enforcement of court orders at the discretion of another branch of government. The Court made this decision in the exercise of its supervisory power over federal courts and not as a matter of due process.

Since *Young*, several state courts have declined to follow the portion of *Young*'s holding requiring that a disinterested prosecutor be appointed out of concern that dependence on disinterested prosecutors, whose salaries would necessarily have to be paid from public funds, would leave many state court orders unenforced and many citizens from vulnerable demographics "deprived of the benefits to which they have already been adjudged entitled."[50]

In part, decisions that reject *Young*'s application in the family law context are based on the recognition that the interests of the public and of the litigant seeking enforcement are not in conflict

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[50] *Wilson*, 984 S.W.2d at 903; *see also Moreland*, 778 S.W.2d at 406.

any more than the interests of a litigant seeking enforcement of a contract are in conflict with the public interest that contracts be enforced. The Supreme Court of Tennessee has noted that "[i]n a contempt proceeding alleging a violation of a court order . . . the interest of the private litigant coincides with the interests of the court [because] [t]he common goal is to force compliance with the court order."[51] The *Wilson* court took comfort in this overlap to conclude that allowing an attorney representing an interested party to prosecute a criminal contempt action neither creates the potential for conflict nor the appearance of impropriety.[52]

These and similar decisions recognize that the congruence of public and private interests in the private enforcement of orders in the family law context outweighs any potential concern about the pro-enforcement bias of a private litigant seeking that relief.[53] This is entirely normal in litigation and it is the job of the court, not the litigant, to make the decision as to what his or her order commands and, in the case of petty contempt, whether it has been violated. The ability of a governmental or specially appointed independent prosecutor to exercise discretion not to prosecute is

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[51] *Wilson*, 984 S.W.2d at 904 (denying a challenge to a contempt conviction based on *Young*); *see also Moreland*, 778 S.W.2d at 407.

[52] *Wilson*, 984 S.W.2d at 904.

[53] *Young*, 481 U.S. at 807.

highly duplicative of the role of the judge in the Family Court. Just as there is no constitutional entitlement to indictment by a grand jury[54] there should be no constitutional entitlement to a prosecutor who is empowered to decline prosecution of a valid court order.

Indeed, many state courts in rejecting the need to resort to a government prosecutor or to appoint a private special prosecutor in family law disputes have relied on the disinterested role of the judge and the various procedural protections in place to eliminate any concern that might otherwise arise.[55] Other state courts have noted that the

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[54] *Green v. United States*, 356 U.S. 165, 184 (1958), *rev'd in part on other grounds*, *Bloom v. Illinois*, 391 U.S. 194 (1968).

[55] *Wilson*, 984 S.W.2d at 903 ("[t]he risk that a defendant's liberty interest will be erroneously deprived by the current practice which allows a litigant's private attorney to prosecute contempt is slight because it is the trial judge, not the private attorney, who actually decides whether a contempt action may proceed."); *Furtado v. Furtado*, 402 N.E.2d 1024 (Mass. 1980) (examining the importance of procedural protections in the private prosecution of criminal contempt prior to *Young* in a domestic relations law context); *Cantrell v. Williams*, No. M2005-00413-COA-R3-CV, 2007 WL 1574280 (Tenn. Ct. App. May 30, 2007) (holding that a conviction for criminal contempt resulting from a *pro se* Petition for Contempt against defendant could not be sustained where guilt was by "preponderance of the evidence"); *Gordon*, 960 So. 2d at 38 (noting that Florida law "provides adequate procedural safeguards to protect against abuse of the contempt sanction" and that "[p]recision is required at each stage of the contempt proceeding").

private party seeking criminal contempt will "not ordinarily [be] clothed with all the powers of a public prosecutor" and so any concern over the private exercise of sovereign power may be non-existent.[56] Other states have noted that proceedings for criminal contempt are *sui generis*.[57] All these cases reflect the view of numerous judges that *Young*'s concerns over the bias of the private litigant seeking criminal contempt do not have sufficient force in the family dispute context to warrant any additional protection against abuse provided by prosecutorial discretion.

These state court decisions are sound and should not be effectively overruled by the decision that this Court renders in this case. There being no valid objection from the due process or separation of powers perspectives, there is no cause for this Court to preclude the States, or the District of Columbia, from allowing private parties to seek criminal contempt in family court matters. Because the proactive role of a judge resolving family law disputes is and should be very different than the passive neutral arbiter of the trademark dispute involved in *Young*, the *Young* requirement of a disinterested prosecutor should not be extended to this area of law.

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[56] *Wilson*, 984 S.W.2d at 904.

[57] *See, e.g., Moreland*, 778 S.W.2d at 403; *Henry v. Schmidt*, 91 P.3d 651, 654 (Okla. 2004) (proceedings are *sui generis* by virtue of statue); *Thomas v. Barrow*, 157 P.3d 1185, 1188 (Okla. Civ. App. 2007).

CONCLUSION

For the reasons stated, it is respectfully submitted that this Court should hold that private party initiated criminal contempt proceedings in family law matters are barred neither under this Court's supervisory power with respect to proceedings in the District of Columbia nor by the Constitution with respect to proceedings in state court.

Respectfully submitted,

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CERTIFICATION

As required by Supreme Court Rule 33.1(h), I certify that the document contains 6,370 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 8, 2010.

By: /s/

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APPENDIX

Background Information about *Amici*

Betty Weinberg Ellerin, retired Presiding Justice of the Appellate Division of the Supreme Court of the State of New York, First Department

Justice Ellerin (retired) is currently a senior counsel in the New York office of Alston & Bird's Litigation and Trial Practice group. She also chairs the New York State Judicial Committee on Women in the Courts and is a member of the New York State Advisory Committee on judicial ethics. She previously served as Vice Chair of the Committee on Character and Fitness of the Appellate Division, First Department, and she served more than 20 years as an Associate Justice on that bench. Justice Ellerin (retired) was the first woman appointed as Deputy Chief Administrative Judge of the State of New York for the New York City Courts where she was responsible for the operation of all the trial courts within the city. She is well known for her continuing interest in, leadership and thoughtful opinions in domestic relations law.

Marjory D. Fields, retired New York State Family Court Judge and Supreme Court Justice

Justice Fields (retired) presided in cases of spousal abuse and intimate partner violence and child abuse and neglect for 16 years. Prior to becoming a judge, Justice Fields (retired) was the managing attorney of the matrimonial law unit at

Brooklyn Legal Services for 15 years, where she and her team represented abused low income women in divorce and child custody proceedings. She testified before Congress and state legislatures in support of stronger legal remedies and protection for abused women and their children. From 1979 to 1989, Justice Fields (retired) was Co-Chair of the New York Governor's Commission on Domestic Violence, working to improve laws and government policy to provide protection for domestic violence victims and their children. Justice Fields retired from the Court in 2002 and returned to working for improved protection for domestic violence victims. She has seen first hand over 38 years the need for private remedies for victims of domestic violence, whose protection order enforcement cases are often overlooked or rejected by government prosecutors.

Judith M. Reichler, retired Judge and Support Magistrate, New York State Family Court

Judge Reichler (retired) is a former Support Magistrate in New York State Family Court and a former Town Justice in New Paltz, New York. Judge Reichler (retired) served as Executive Director of the New York State Commission on Child Support during the development of the Child Support Standards Act. She also served as President of the Ulster County Magistrates' Association, and previously served on the New York State Family Violence Task Force, which develops and presents training to judges throughout the state. Judge Reichler (retired) has authored several articles on

child support and battered women and currently works as a consultant to family law attorneys.

The American Academy of Matrimonial Lawyers

Founded in 1962, AAML's mission is "to encourage the study, improve the practice, elevate the standards and advance the cause of matrimonial law, to the end that the welfare of the family and society be protected." There are currently more than 1600 Fellows in 50 states generally recognized as preeminent family law practitioners with a high level of knowledge, skill and integrity. Academy Fellows represent individuals in all facets of family law, including divorce, annulment, prenuptial agreements, postnuptial agreements, marital settlement agreements, child custody and visitation, business valuations, property valuations and division, alimony, child support and other family law issues.

To qualify for membership Fellows must be recognized by the bench and bar in his or her jurisdiction as an expert practitioner in matrimonial law; be admitted to the bar for 10 years; have the majority of their practice as matrimonial law; obtain state certification or have completed 15 hours of continuing legal education in each of previous five years; pass an examination on wide-ranging issues pertaining to matrimonial and family law; be interviewed by a state board of examiners; aspire to the ethical standards set forth in the "Bounds of Advocacy" as well as state bar rules of professional conduct and demonstrate

involvement in study or improvement of matrimonial law, such as publishing articles or continuing education presentations.

This brief does not necessarily reflect the views of any judge who is a member of the American Academy of Matrimonial Lawyers. No inference should be drawn that any judge who is a member of the Academy participated in the preparation of this brief or reviewed it before its submission. The AAML does not represent a party in this matter, is receiving no compensation for acting as *amicus*, and has done so *pro bono publico*.

The American Academy of Matrimonial Lawyers joins the within brief as *amicus curiae* in support of the preservation of private rights of action to prosecute criminal forms of contempt in family law matters not limited to those matters involving domestic violence.

The Family Violence Litigation Clinic at Albany Law School

The Family Violence Litigation Clinic ("FVLC") at Albany Law School provides direct representation and technical assistance to survivors of domestic violence in Albany, Rensselaer, Schenectady and Saratoga counties in New York, while teaching law students about Family Court procedure, substantive law and the dynamics of domestic violence. In addition, the FVLC participates in community outreach initiatives to help educate the general public about domestic violence and civil remedies. Direct representation may include matters such as civil orders of protection, custody, child support,

visitation and child neglect proceedings. We regularly use the tools of contempt to help our clients and their children maintain their safety, as well as for batterer accountability.

Day One

Day One is the only agency in New York City solely focused on providing comprehensive legal services to teen survivors of dating violence. We also operate the City's only Dating Violence Helpline specifically for young people, ages 12-24. With a specific focus on advocating on behalf of teens, Day One is recognized for the organization's knowledge and resources for teen survivors of dating violence and for providing widespread training for young people, law enforcement, and organizations working on behalf of young people.

Since its founding in 2003, Day One has developed a comprehensive program that integrates professional expertise advocating with and on behalf of young people to help provide for the complex legal and social needs of survivors. Within the organization, our legal department works to protect the rights of survivors while our Community Education and Peer Leadership programs work with young people in middle school, high school, and college to help prevent the occurrence of dating violence and to provide referrals and resources. Our direct services include the helpline, crisis intervention, counseling, advocacy, and legal assistance. We also work consistently to increase public awareness, train professionals, advocate for needed system changes,

and insure social accountability and responsiveness in identifying and assisting victims.

InMotion

InMotion, a nonprofit corporation founded in 1993, seeks to make a real and lasting difference in the lives of women—low-income, under-served, abused—by offering them legal services designed to foster equal access to justice and an empowered approach to life. InMotion fulfills its mission by providing free, quality legal services, primarily in the areas of matrimonial, family, and immigration law, in a way that acknowledges mutual respect, encourages personal growth, and nurtures individual and collective strength. InMotion also works to promote policies that make our society more responsive to the issues, such as domestic violence, confronting the women we serve.

Legal Aid of North Carolina

The Domestic Violence Prevention Initiative (DVPI) is a specialized, statewide project of Legal Aid of North Carolina that provides free legal assistance to victims of domestic violence. It is comprised of attorney/advocates based in Legal Aid of North Carolina field offices (geographically located across North Carolina) and a project director located in Raleigh. These DVPI attorneys/ advocates are trained in the laws available to help increase the safety and self-sufficiency of victims, as well as the dynamics of domestic violence and safety planning. DVPI are asked to train members

of the private bar, law enforcement and members of the judiciary on a regular basis.

The Domestic Violence Prevention Initiative also works closely with community-based programs, agencies and task forces serving victims of domestic violence. The DVPI has existing formal collaborative agreements and referral protocols with more than 60 domestic violence victim services organizations throughout the state, and informal working relationships with at least 20 others. Additionally, the DVPI partners with several law schools, at which a DVPI attorney trains and supervises law students in the domestic violence clinics.

Legal Services NYC

Legal Services NYC is the largest civil legal services program in the country and has provided free legal services to poor people in New York City for over 40 years. We have offices in all the boroughs of the City, and have a long history of providing high quality legal representation to victims of domestic violence. In addition to advocating for orders of protection, we represent victims in custody, visitation, child support, and divorce matters. Our neighborhood offices have established strong ties to community based domestic violence groups as well as other agencies in the community and work closely with other public interest legal agencies involved in this work. Our offices are some of the lead agencies at the Family Justice Centers in the boroughs where they are established and have been actively involved in their creation. In addition to

providing representation to individual clients, we provide continuing legal education to the public interest law community, provide consultation on cases to other lawyers, and participate in advocacy organizations, such as the Lawyers' Committee Against Domestic Violence.

My Sisters' Place

My Sisters' Place strives to engage each member of society in our work to end domestic violence so that all relationships can embrace the principles of respect, equality, and peacefulness. Since 1978 we have advanced this mission in Westchester County, New York and the surrounding region through advocacy, community education, and services to those harmed by domestic violence. Through advocacy, we act as a force for social change in law and public policy. Through community education, we challenge public perceptions of intimate violence and the social inequities that give rise to it, and we promote prevention with a special emphasis on youth. Through direct services, we support the abused, primarily women and their children, in seeking safety, self-determination, and justice.

Established in 1997, My Sisters' Place's Legal Center provides victims of domestic violence who are financially unable to retain counsel, greater access to legal protections and remedies critical to their survival and safety. Currently, the Legal Center serves over 1,000 clients each year, primarily with issues related to family law and immigration. The family law docket includes orders

of protection, custody, visitation, child and spousal support, and abuse and neglect matters.

The Sargent Shriver National Center on Poverty Law (Shriver Center)

The Shriver Center champions social justice through fair laws and policies so that people can move out of poverty permanently. Our methods blend advocacy, communication, and strategic leadership on issues affecting low-income people. National in scope, the Shriver Center's work extends from the Beltway to state capitols and into communities building strategic alliances. The Shriver Center's work includes domestic violence and family law. A family life free from domestic violence and strife over custody, visitation and child support is essential for the economic, physical, mental and emotional well-being of all family members. Court orders, whether they are protective orders, custody orders, child support orders, or visitation orders, must be complied with and vigorously enforced when they are not. The ability to enforce civil court orders through criminal contempt initiated by an interested party must be preserved. The Shriver Center has a strong interest in the enforcement of court orders that help individuals and families lead safe and secure lives.

STEPS To End Family Violence

Since 1986 STEPS to End Family Violence ("STEPS"), a program of Edwin Gould Services for Children and Families, has provided comprehensive

services to victims of domestic violence and provides the only direct services program specifically addressing abused women involved in the criminal justice system, including those who assault or kill their abuser. Some are charged with child neglect because their abuser harmed the children. STEPS provides a complete assessment of the needs of both mother and child and provides appropriate services. STEPS provides additional specialized services such as counseling, court advocacy, parenting skills, children's therapy, and civil legal services to victims of interpersonal violence.

The Domestic Violence Litigation Clinic at St. John's University School of Law

The Clinic provides students with an exciting, well-supervised, hands-on clinical experience. Clinic students, working in pairs, represent clients in family offense and visitation matters throughout the five boroughs of New York City. Students have the opportunity to handle cases from inception to final disposition. Clinic students enroll in the domestic violence clinic placement and in a two-credit seminar component. The seminar provides students with substantive knowledge in aspects of family, matrimonial, immigration, and criminal law relevant to the practice portion of the course. In addition, students are introduced to the integration of law and psychology specific to intimate violence and participate in skills classes in interviewing, safety planning, case preparation, evidence gathering, legal writing, trial advocacy and negotiation skills. This two-semester course

maximizes each student's opportunity to fully service each client while maintaining continuous client representation on sensitive legal matters.

Professor D. Kelly Weisberg

Professor Weisberg teaches at Hastings College of the Law, University of California, in the areas of Family Law, and Children and the Law. She received her B.A. at Brandeis University, Ph.D. at Brandeis University, and J.D. degree from Boalt Hall School of Law, UC Berkeley. She joined the Hastings faculty in 1982 after two years on the faculty at Washington University School of Law. Before that time, she participated in federally-funded studies of juvenile parole, justice prostitution, family violence, and child sexual abuse. At Hastings, she served as Director of the Family Law Concentration from 2004-2007. She is the author of several law review articles and books, including Modern Family Law: Cases and Materials (co-authored with Susan F. Appleton) (Aspen Publishers, 4th ed. 2009); Adoption and Assisted Reproduction: Families Under Construction (co-authored with Susan F. Appleton) (Aspen Publishers, 2009); Child, Family, State: Cases and Materials on Children and the Law (co-authored with Robert H. Mnookin) (Aspen Publishers, 6th ed., 2009); The Birth of Surrogacy in Israel (University Press of Florida, 2005); and the Applications of Feminist Legal Theory to Women's Lives (Temple University Press, 1996). In Spring 2010, she holds the position of Hurst Distinguished Visiting Chair at the University of Florida Levin College of Law.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
FEB - 4 2010
OFFICE OF THE CLERK

NO. 08-6261

IN THE

Supreme Court of the United States

JOHN ROBERTSON,

Petitioner,

v.

UNITED STATES *ex rel.* WYKENNA WATSON,

Respondent.

On Writ of Certiorari to the District of Columbia Court of Appeals

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the National Association of Criminal Defense Lawyers ("NACDL") is a professional bar association that advances the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. NACDL has more than 12,800 direct members, including private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors, and judges. NACDL's interest in this case is to ensure that criminal contempt actions are treated as "crimes in the ordinary sense" in accordance with Supreme Court precedent and that defendants in these actions are afforded all the rights and protections that flow from that treatment.

Given its purpose and focus, NACDL is vitally interested in the outcome of this case and in the proper interpretation and implementation of the procedures, rights and obligations in criminal contempt prosecutions for violations of civil protection orders specifically, and in all criminal contempt prosecutions more generally. Representing those who have been and will continue to be on the front lines of protecting criminal defendants' rights, NACDL has a unique perspective that should prove

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[1] The parties have consented to the filing of this brief. A letter of consent by each party is on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

helpful to the Court and may not be reflected in the parties' submissions.

SUMMARY OF ARGUMENT

The District of Columbia Court of Appeals' holding that a criminal contempt action is "properly brought in the name of a private person, here Ms. Watson, rather than in the name of the sovereign," (Cert. Pet. App. A. 15) is an unprecedented and unnecessary plunge into the uncharted and murky waters of private criminal prosecutions. Private criminal prosecutions were long ago left on the shores of England, which had nearly abandoned the practice at the time of the founding of the Republic. Private criminal prosecutions are contrary to the Constitution's basic conception of the criminal law, this Court's precedents, and more than two hundred years of practice in the colonies and states.

Private criminal prosecutions also are gravely offensive to due process and, if allowed, would result in reexamination of the applicability of numerous fundamental protections of the criminal process, including the power of the executive to pardon, the disclosure of exculpatory evidence mandated by *Brady v. Maryland*, 373 U.S. 83 (1963), and the Double Jeopardy Clause. If the Court were to allow private criminal prosecutions, the Court necessarily also would authorize complainants' private attorneys to serve as criminal prosecutors on behalf of their clients, an arrangement sufficiently threatening to actual and perceived fairness that this Court banned the practice in federal district courts in *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S.

787 (1987). Many lower courts likewise have banned interested private prosecutors on ethical, constitutional, and other grounds. To take the next step and remove the sovereign from any control of a criminal action far exceeds the limits of fairness imposed by the Due Process Clause.

The Court of Appeals' radical departure from the Constitution not only was unjustifiable, it also was unnecessary. There are ample resources and many alternatives available to permit the sovereign to prosecute violations of civil protection orders and acts of domestic violence.

The Court of Appeals' decision must be reversed.

ARGUMENT

I. THE COURT OF APPEALS' DECISION DEPARTS FROM A CENTURY OF FEDERAL AND STATE AUTHORITY HOLDING THAT CRIMINAL CONTEMPT PROSECUTIONS ARE ACTIONS BROUGHT ON BEHALF OF THE SOVEREIGN, NOT PRIVATE PARTIES.

Petitioner Robertson's brief establishes the ancient pedigree of a "crime" as a public wrong prosecuted in the name of the sovereign and the Framers' reliance on that premise throughout the Constitution. For a century, this Court uniformly has applied that bedrock principle to criminal contempts. Time and again, this Court has treated a criminal contempt as "a crime in the ordinary sense." *United States v. Dixon*, 509 U.S. 688, 696 (1993) (quoting *Bloom v. Illinois*, 391 U.S. 194, 201 (1968)).

Criminal contempts are crimes against the sovereign, even when:

1. the contempt proceeding is initiated by a private party, *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 444-45 (1911) ("Proceedings for civil contempt are between the original parties, and are instituted and tried as a part of the main cause. But, on the other hand, proceedings at law for criminal contempt are between the public and the defendant, and are not a part of the original cause."); *Gompers v. United States*, 233 U.S. 604, 610 (1914) ("These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristics of crimes as that word has been understood in English speech.");

2. the contempt arises from a violation of a court order in a civil dispute between private parties, *United States v. Providence Journal Co.*, 485 U.S. 693, 700 (1988) ("The fact that the allegedly criminal conduct concerns a violation of a court order instead of common law or a statutory prohibition does not render the prosecution any less an exercise of the sovereign power of the United States."); and

3. the contempt action is prosecuted by private counsel for a party rather than a public prosecutor, *Dixon*, 509 U.S. at 727 n.3 (White, J., concurring in the judgment in part and dissenting in part) ("That the contempt proceeding was brought and prosecuted by a private party . . . is immaterial."); *Young*, 481 U.S. at 804 ("Private attorneys appointed to prosecute a criminal contempt action

represent the United States, not the party that is the beneficiary of the court order allegedly violated.").

State supreme courts agree that criminal contempts are crimes to be prosecuted in the name of the state. In *Denny v. State*, 182 N.E. 313, 321 (Ind. 1932), the court held "[t]hat the information for a criminal contempt should be entitled 'State of Indiana v. the defendant' and filed as an independent action and prosecuted by the state." In *Peterson v. Peterson*, 153 N.W.2d 825, 830 (Minn. 1967), the court explained that "criminal contempts are offenses against the dignity of the state as a whole. . . . [;]criminal contempt is not a proceeding in the action out of which the alleged contempt arose, but is collateral to it . . . ." In *Leeman v. Vocelka*, 32 N.W.2d 274, 278 (Neb. 1948), the court held that criminal contempt "could only be prosecuted in the name of the State...." *Accord City of Lawton v. Barbee*, 782 P.2d 927, 930 (Okla. 1989) (prosecution for criminal contempt is criminal in nature and must be prosecuted in the name of the state); *State ex. rel. Koppers Co., Inc. v. International Union of Oil, Chem. and Atomic Workers*, 298 S.E. 2d 827, 829 (W. Va. 1982) ("A criminal contempt should be brought in the name of the State.").

State courts also agree that it matters not whether a criminal contempt proceeding arises from a civil action, is initiated by a private party, or is prosecuted by a private party's counsel. It is still deemed to be one brought by the state. *See, e.g., Marcisz v. Marcisz*, 357 N.E.2d 477, 479-80 (Ill. 1976) (criminal contempt prosecution for violation of divorce decree was brought in the name of the

People); *Peterson*, 153 N.W.2d at 828-29 (criminal contempt is "conduct offensive to the dignity of the state as a whole" and is between the alleged contemnor and the State of Minnesota); *McDermott v. McDermott*, 602 N.W.2d 676, 679 (Neb. Ct. App. 1999) (criminal contempt action for violation of visitation order is brought "in the name of the State"); *Disabatino v. Salicete*, 671 A.2d 1344, 1352 (Del. 1996) (contempt action for violation of Family Court restraining order is "between the public and the defendant") (internal quotation omitted); *Barbee*, 782 P.2d at 930 (holding that all criminal contempt actions "must be prosecuted in the name of the State"); *State ex rel. Anderson v. Daugherty*, 191 S.W. 974 (Tenn. 1916) (privately prosecuted criminal contempt action is "between the public and the accused") (internal quotation omitted).

A few states allow a complainant's counsel to serve as the prosecutor of a crime other than contempt, usually a misdemeanor. In those instances, the prosecutions likewise are deemed ones brought on behalf of the state. *See Cronan ex rel. State v. Cronan*, 774 A.2d 866, 880, 871 n.3 (R.I. 2001) ("Although they were privately employed [by the alleged victim of a domestic assault], the attorneys who prosecuted this case represented the state."); *State v. Storm*, 661 A.2d 790, 793 (N.J. 1995); *State v. Riser*, 294 S.E.2d 461, 465 (W. Va. 1982); *State v. Westbrook*, 181 S.E.2d 572, 583 (N.C. 1971), *vacated on other grounds*, 408 U.S. 939 (1972) (mem.) ("The prosecuting attorney, whether the solicitor or privately employed counsel, represents the State."); *Robinson v. State*, 68 So. 649, 654 (Fla. 1915); *State v. Valentine*, 864 A.2d 433, 434 (N.J.

Super. Ct. App. Div. 2005) (stating that a victim's attorney who prosecuted the defendant for simple assault stemming from a domestic dispute "represented the State at trial").

This universal treatment of criminal contempts as actions on behalf of the sovereign was the underpinning of this Court's decision in *Dixon*, which addressed the identical statute under which Mr. Robertson was prosecuted—D.C. Code § 16–1005(f). In *Dixon*, this Court considered whether a successful prosecution of Michael Foster for criminal contempt under D.C. Code § 16-1005(f) for violating a CPO by assaulting the CPO holder raised a jeopardy bar to his subsequent prosecution for assault by the United States. The contempt prosecutor of Foster was the CPO holder's private attorney, not the United States Attorney. In analyzing whether the double jeopardy bar applied to Foster's subsequent prosecution, this Court proceeded with the unstated assumption that the United States was the true party-in-interest to Foster's criminal contempt prosecution for the CPO violation, even though Ana Foster's attorney served as the prosecutor. This Court stated that the offense of criminal contempt established by D.C. Code § 16-1005(f) "is a crime in the ordinary sense," 509 U.S. at 696, and held it "obvious" that the § 16-1005(f) contempt action raised a jeopardy bar to the subsequent assault prosecution. *Id.* If this Court had not assumed that the private criminal contempt prosecution for CPO violations was brought on behalf of, and in the name of, the United States, the Court could not have held that Foster's subsequent assault prosecution was barred. *See, e.g., Heath v.*

Alabama, 474 U.S. 82, 88 (1985) (double jeopardy bar does not generally apply when dual sovereigns prosecute the same conduct). *Dixon* is therefore flatly inconsistent with the Court of Appeals' holding that Robertson's prosecution under § 16-1005(f) was not brought on behalf of the United States but instead was a wholly private action by the CPO holder.

II. PRIVATE INTERESTED PROSECUTORS THREATEN THE ACTUAL AND PERCEIVED FAIRNESS OF CRIMINAL PROCEEDINGS. TO GO FURTHER, AND REMOVE ANY ROLE FOR THE SOVEREIGN, WOULD CLEARLY VIOLATE DUE PROCESS.

Although the constitutionality of private interested prosecutors is not expressly presented as an issue in this case, a ruling upholding private criminal prosecutions would *de facto* permit private attorneys for interested parties to conduct these private criminal prosecutions. Some courts, including this Court, have found that the use of private interested criminal prosecutors creates too great a risk of conflicts of interest and unfairness and have banned the practice on non-constitutional grounds. Others have found that the threat to criminal defendants' rights and to the public perception of justice is so great that the practice has been deemed a violation of due process.

This Court, in a line of decisions beginning with *Berger v. United States*, 295 U.S. 78 (1935), has recognized that prosecutors, as "servant[s] of the

law," play a unique and critical role in the nation's administration of criminal justice. *Id.* at 88. In *Berger*, the Court emphasized that the obligation of prosecutors is not to win cases but to "govern impartially" and to see "that justice shall be done." *Id.* Prosecutors are public officials who serve the public interest. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249 (1980). And, because they wield the substantial resources of the State to investigate and prosecute individuals, this Court requires assurance that "those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice." *Young*, 481 U.S. at 814. *See also Cheney v. United States Dist. Court for Dist. of Columbia*, 542 U.S. 367, 386 (2004) (noting that the decision to prosecute a criminal case is made by a publicly accountable prosecutor under an ethical obligation to serve the cause of justice). Ethics rules likewise impose special obligations on prosecutors as "ministers of justice." *See* Model Rules of Professional Conduct R. 3.8; *id.* at Comment [1] ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."). A prosecutor's ethical duties include "specific obligations to see that the defendant is accorded procedural justice," such as the duty to disclose evidence that negates the guilt of the accused or mitigates his punishment. *Id.*

The obligation of an attorney representing a private party is not, however, to do justice. She is ethically required to zealously represent her client and to make the client's interests paramount, within the bounds of the law. *See Young*, 481 U.S. at 807.

See also Model Rules of Professional Conduct, Preamble [9]; Rule 1.2.

In *Young*, this Court placed clear limits on the appointment of private prosecutors in criminal contempt actions. The Court held that counsel for a party that is the beneficiary of a court order may not be appointed to undertake a criminal contempt prosecution for alleged violations of that order. 481 U.S. at 809. With unmistakable clarity, the Court noted that private attorneys appointed to prosecute a criminal contempt action "represent the United States, not the party that is the beneficiary of the court order allegedly violated," are "appointed solely to pursue the public interest in vindication of the court's authority," and "should be as disinterested as a public prosecutor who undertakes such a prosecution." *Id.* at 804. Observing that the Government's interest is in the dispassionate assessment of the propriety of a charge for criminal contempt—while a private party's interest is in obtaining the benefits of the court order—the Court noted that these interests may be at odds, creating an unacceptable risk of a conflict of interest. *Id.* at 805-06. Because of this conflict and the clear opportunity for interested private counsel to base prosecutorial decisions on the client's best interests rather than the public's, this Court, exercising its supervisory authority, barred lower federal courts

from appointing interested counsel to prosecute criminal contempt actions. *Id.* at 809.[2]

Like this Court in *Young*, state courts have recognized the clear ethical conflict, as well as the resulting danger to defendants, when interested private counsel are appointed to prosecute criminal contempt actions. In *Rogowicz v. O'Connell*, 786 A.2d 841, 844 (N.H. 2001), the Supreme Court of New Hampshire reversed the conviction of a defendant for criminal contempt arising from his violation of a civil protective order. Following the reasoning of *Young*, the court held that interested private counsel cannot prosecute criminal contempt actions in the courts of New Hampshire. The court found the inherent conflict between a prosecutor's duty to pursue justice on behalf of the public and a private prosecutor's duty of loyalty to her client created an intolerable risk to the rights of the criminal defendant. *See id.*

Other state courts also have adopted the reasoning of *Young*. *See Disabatino*, 671 A.2d at 1352-53 (state courts of Delaware cannot appoint interested party's counsel to prosecute criminal contempt arising from Family Court proceeding or other civil litigation); *Dept. of Soc. Services v. Montero*, 758 P.2d 690, 693 (1988) (counsel for beneficiary of court order may not prosecute criminal contempt action).

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[2] In a concurring opinion, Justice Blackmun stated that he "would hold that the practice—federal or state—of appointing an interested party's counsel to prosecute for criminal contempt is a violation of due process." *Young*, 481 U.S. at 814-15.

The Supreme Court of West Virginia went further, finding a violation of due process when criminal contempt charges were prosecuted by private lawyers representing a party that had obtained an underlying civil injunction. *International Union of Oil, Chem. & Atomic Workers*, 298 S.E.2d at 832. The court reasoned that "the apparent conflict of interest and pressure of 'wearing two hats' militates against permitting a party's private counsel to prosecute a criminal contempt charge stemming from a civil suit," noting that "[j]ustice is better served by avoiding appearances of impropriety and of inherent conflicts of interest, presented when a private party's counsel in a civil suit is permitted to prosecute a criminal contempt against an opposing party." *Id.* at 830-31. *See also Brotherhood of Locomotive Firemen and Enginemen v. United States*, 411 F.2d 312, 319 (5th Cir. 1969) (criminal contempt prosecution of labor union and officials by counsel for beneficiary of injunction violated due process).

Some states, citing the principles of *Young*, have eliminated their practice of allowing counsel for complainants to serve as private prosecutors of minor criminal offenses.[3] The Appellate Division of New York recently held that an attorney retained by a complainant cannot serve as a private prosecutor. *See In the Matter of Sedore*, 56 A.D. 3d 60 (2d Dept. 2008). The court found that differences between a prosecutor's ethical duties to the public and a private

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[3] Many states abolished this practice long ago. *See, e.g., Commonwealth v. Gibbs*, 70 Mass. (4 Gray) 146, 147 (1855); *Biemel v. State*, 37 N.W.2d 244, 247 (Wis. 1888).

prosecutor's ethical duties to his client (the complainant) create an intolerable conflict of interest. *Id.* at 67. The court further elaborated:

> At bottom, the prosecution of a criminal offense is a public function, not a private one ... "The idea that the criminal law, unlike other branches of the law such as contracts and property, is designed to vindicate public rather than private interests is now firmly established. The participation of a responsible public officer in the decision to prosecute and in the prosecution of charges gives greater assurance that the rights of the accused will be respected...The absence of a trained prosecution official risks abuse or casual and unauthorized administrative practices and dispositions that are not consonant with our traditions of justice." (ABA Standards for Criminal Justice, Prosecution Function and Defense Function, Commentary, Standard 3-21 (3d ed. 1993)). Prosecution of a criminal complaint by an attorney retained by the complaining witness is simply inconsistent with these principles.

Id. at 68.

Other states have severely limited interested private prosecutions, not only due to the ethical issues presented but also due to "the dangers they

pose both to the rights of criminal defendants and to the sound administration of justice." *State v. Martineau*, 808 A.2d 51, 53 (N.H. 2002) (limiting interested party prosecutors to criminal offenses which cannot be punished by imprisonment). *See also Meister v. People*, 31 Mich. 99, 106 (Mich. 1875) (criminal prosecution should not be entrusted to those who may be tempted to use it for private ends); *Flege v. State*, 142 N.W. 276, 277 (Neb. 1913) (appointment of private prosecutor not in interest of impartial trial); *Waldron v. Tuttle*, 4 N.H. 149, 151 (N.H. 1827) (emphasizing that prosecutions by private counsel "are often commenced in very doubtful cases and for the most trivial offences and are not infrequently found to originate in private quarrels and to be carried on to vex and harass an opponent.")

Other states historically have allowed private parties to employ counsel to assist public prosecutors. Even in those cases, however, when a public prosecutor serves as co-counsel, courts have found violations of state or federal constitutional due process protections. In *Cantrell v. Virginia*, 329 S.E.2d 22 (Va. 1985), a private attorney assisting the public prosecutor in a murder prosecution also represented the victim's parents who were seeking to have custody of the defendant's child transferred to them as grandparents. The Supreme Court of Virginia noted that the likelihood of conflict between a lawyer's duty to represent the interests of a civil client and his duty, as a prosecutor, to administer the criminal law impartially in the interests of justice, rises to the level of an "overwhelming probability." *Id.* at 26. The court found a violation

of the defendant's state constitutional due process rights and *per se* reversible error because "a private prosecutor having a civil interest in the case so infects the prosecution with the possibility that private vengeance has been substituted for impartial application of the criminal law, that prejudice to the defendant need not be shown." *Id.* *See also State v. Eldridge*, 951 S.W.2d 775, 782 (Tenn. App. 1997) ("We have no hesitation in concluding that the participation by special prosecutors who represent the victim in a civil matter arising from the same incident giving rise to the criminal prosecution is a violation of the defendant's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution as well as the Law of the Land provision in Article I, Section 8 of the Tennessee Constitution.").

In *State v. Harrington*, the Supreme Court of Missouri banned all participation by private prosecutors: "the practice of allowing *private* prosecutors, employed by *private* persons, to participate in the prosecution of criminal defendants, is inherently and fundamentally unfair." 534 S.W.2d 44, 48 (Mo. 1976) (emphasis in original). The court found "intolerable" the entry of an interested private prosecutor—who owes a complete duty of loyalty to his client—into prosecutorial decisions such as whether to indict and prosecute, what evidence to submit, whether to engage in plea bargain negotiations, and what punishment to recommend to the court. *See id.* at 50.

The federal courts, considering state prisoners' federal habeas corpus petitions, have found federal

due process violations "when a private prosecutor...effectively control[s] crucial prosecutorial decisions," such as "whether to prosecute, what targets of prosecution to select, what investigative powers to utilize, what sanctions to seek, plea bargains to strike, or immunities to grant." *East v. Scott*, 55 F.3d 996, 1000 (5th Cir. 1995) (quoting *Person v. Miller*, 854 F.2d 656, 664 (4th Cir. 1989)). *See also Webber v. Scott*, 390 F.3d 1169, 1176 (10th Cir. 2004).

Commentators have urged that it is finally time to end the anachronistic practice of allowing interested private prosecutors to participate in criminal trials, and to apply the same rules to prosecutors that prohibit biased or improperly-influenced judges, juries and defense attorneys. *See, e.g.*, Matthew S. Nichols, *No One Can Serve Two Masters: Arguments Against Private Prosecutors*, 13 Cap. Def. J. 279 (2001); John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 Ark. L. Rev. 511, 557-58 (1994); Patricia Moran, Note, *Private Prosecutors in Criminal Contempt Actions Under Rule 42(b) of the Federal Rules of Civil Procedure*, 54 Fordham L. Rev. 1141, 1149 (1986); Andrew Sidman, *The Outmoded Concept of Private Prosecution*, 25 Am. U. L. Rev. 754 (1975). The ABA's Standards of Criminal Justice also disapprove of the use of private prosecutors. *See* ABA Standards for Criminal Justice, Prosecution Function and Defense Function, Commentary, Standard 3-21 [3d ed. 1993] ("The prosecution function should be performed by a public prosecutor who is a lawyer subject to the standards of professional conduct and discipline.")

The grave risks to fairness posed by interested private prosecutors may well be enough to ban the practice as violative of the Due Process Clause. The private criminal action created by the Court of Appeals in this case pushes farther into the realm of unfairness and conflicts of interest. Deeming the sovereign the real party at least allows a public prosecutor to be substituted as the prosecutor. *See, e.g., Cronan*, 774 A.2d at 875. Replacement of an interested private prosecutor by the public prosecutor may become necessary in a particular case to secure the fundamental goal of a criminal prosecution—to do justice—and to take practical steps to achieve that goal. Those steps include taking actions to avoid the double jeopardy impact of a criminal contempt prosecution[4], moving to dismiss frivolous and vindictive prosecutions, plea bargaining, securing cooperation in the prosecution of others, and more generally exercising prosecutorial discretion. These options would no longer be available in the private criminal action for contempt created by the Court of Appeals. The CPO holder would exercise complete control, including the right to exclude the public prosecutor.

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[4] In *Dixon*, Justice White expressed the hope that the potential for a double jeopardy bar arising from a CPO criminal contempt action would facilitate "cooperation between the government and parties bringing contempt proceedings." *See* 509 U.S. at 730 (White, J.). However, if a private party is deemed the real party in interest, the United States Attorney or any other public prosecutor would face obstacles in preventing the bar if the private party refused to stay or dismiss "her" action.

Another risk to fairness posed by the Court of Appeals' newly minted cause of action is the unknown that lies ahead. When a prosecution is brought on behalf of the sovereign, even if brought by an interested private prosecutor, the rules are clear. By contrast, in a new world of private criminal actions, the rules are anything but clear. Does *Brady v. Maryland* and its progeny apply if the criminal contempt action is prosecuted on behalf of a private individual, rather than the State? Do private attorneys representing private parties in these private criminal actions have the absolute immunity enjoyed by public prosecutors from civil liability to acquitted criminal defendants? *See, e.g., State (Haas Complainant) v. Rollins*, 533 A.2d 331 (N.H. 1987) (private prosecutors do not have absolute prosecutorial immunity). Can a defendant still seek clemency or a pardon from the executive if he was not prosecuted in the name of the sovereign? *See Ex Parte Grossman*, 267 U.S. 87, 121 (1925) (holding that Article II pardon power extends to criminal, but not civil, contempt convictions imposed in federal courts). Will all of the other rights afforded criminal contempt defendants, including the privilege not to testify and to proof beyond a reasonable doubt, now be in play as creative, zealous private attorneys for CPO holders or other complainants litigate this new cause of action? How are vindictive or malicious prosecutions systematically prevented if there is no government oversight or prosecutorial discretion? Affirming the Court of Appeals' opinion will create a host of uncertainties for the litigants, courts, and legislatures of those jurisdictions that wade into the uncharted waters of private criminal actions. If the

enforcement of a CPO through criminal contempt is not undertaken in the name of the sovereign, carefully constructed rights, obligations, and rules of criminal practice are susceptible to challenge and re-litigation.

Emotionally charged CPO criminal contempt actions present an especially high risk of prosecutions that are meritless or intended to advance collateral objectives. Professor Mary M. Cheh, now a Councilmember on the District of Columbia's legislative body, addressed a District of Columbia trial court decision permitting the use of interested private prosecutors in CPO criminal contempt actions, expressing serious reservations about the practice:

> [T]here remains the concern that lies at the heart of disinterestedness: a doubt whether the case would have been brought at all, and whether it was brought to gain advantage in collateral matters. These concerns are real and not adequately accounted for by a rule that simply declares CPO contempt to be different from other contempt....A victim in a CPO enforcement can have one or more conflicts, ranging from spite and vindictiveness to seeking an advantage in related litigation involving divorce, child custody, or award of alimony and child support.

Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding

and Transcending the Criminal-Civil Law Distinction, 42 Hastings L.J. 1325, 1409-11 (1991)

Because the private criminal action offends the Due Process Clause, this Court should not permit its use.

III. PRIVATIZING CRIMINAL CONTEMPT IS AN UNNECESSARY RESPONSE TO DOMESTIC VIOLENCE AND IS CONTRARY TO THE PRINCIPLE THAT SUCH CRIMES ARE OFFENSES AGAINST THE STATE.

Although such a radical departure from the Constitution can never be justified, the Court of Appeals' creation of a private criminal action was also unnecessary. There are ample resources and alternatives available for prosecutions by the sovereign of domestic violence offenses, including violations of civil protection orders.

A. Privatizing Criminal Contempt Is Not Crucial to Domestic Violence Enforcement.

During the past 30 years virtually all U.S. jurisdictions have enacted strong and significant legislation to protect women from violence.[5] One of

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[5] *See, e.g.*, Elizabeth M. Schneider, *Domestic Violence Reform in the Twenty-First Century: Looking Back and Looking Forward*, 42 Fam. L.Q. 353, 353-4 (2008) ("It is safe to say that in no aspect of family law has there been more dramatic change than in the law of domestic violence. Fifty years ago, domestic violence was not even recognized as a subject of study or as a legal problem—it was simply invisible

the most far-reaching legislative initiatives has been the Violence Against Women Act ("VAWA"),[6] passed by Congress in 1994. VAWA was the nation's first attempt at a multi-pronged legal response to violence against women, and the law "remains both a practical tool for dealing with violence against women and a symbol of national commitment to eradicate the problem."[7] Indeed, "[s]ince the passage of VAWA, there has been a paradigm shift in how the issue of violence against women is addressed in communities throughout the nation."[8]

In testimony before the Senate Judiciary Committee, domestic violence expert Karen Tronsgard-Scott summarized some of the remarkable advances in protecting women from violence since VAWA's passage:

> VAWA has unquestionably improved the national response to domestic violence. Since VAWA passed in 1994,

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.... Today, intimate violence is recognized as a serious harm—a harm within intimate relationships that has an impact on every aspect of the law ....").

[6] Pub. L. No. 103-322, 108 Stat. 1902 (1994). VAWA was reauthorized in 2000 and 2005.

[7] Sally F. Goldfarb, The Legal Response to Violence Against Women in the United States of America: Recent Reforms and Continuing Challenges, 1 (July 30, 2008) (Paper Presented to the United Nations Expert Group Meeting on Good Practices in Legislation on Violence Against Women, Vienna, Austria).

[8] Press Release, U.S., Dept. of Justice, Office of Public Affairs, Justice Department Commemorates Fifteen Years of the Violence Against Women Act, 1 (Sept. 14, 2009) ("DOJ VAWA Press Release").

> states have passed more than 660 laws to combat domestic violence, sexual assault and stalking. More victims report domestic violence to the police....The rate of non-fatal intimate partner violence against women has decreased by 63%. Remarkably, the number of individuals killed by an intimate partner has decreased 24% for women and 48% for men.
>
> Prior to VAWA, most police officers were not adequately trained to handle incidents of domestic and sexual violence and would routinely fail to make arrests or collect appropriate evidence .... VAWA has helped to change this ....[9]

Tronsgard-Scott concluded that VAWA "is working," explaining that "[s]ervice providers, law enforcement officers, prosecutors, judges, and others in the continuum of services are coordinating their efforts to ensure that victims and their families are independent and safe."[10]

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[9] Karen Tronsgard-Scott, Director of the Vermont Network Against Domestic and Sexual Violence, Testimony Before the Senate Judiciary Committee, 2009 WLNR 11110754 at *3 (June 10, 2009). ("Tronsgard-Scott Senate Testimony").

[10] *Id.* at *5. *See also* U.S. Dept. of Justice, Office on Violence Against Women, 2006 Biennial Report to Congress on the Effectiveness of Grant Programs Under the Violence Against Women Act (2006).

Only a few months ago President Barack Obama commemorated the fifteenth anniversary of VAWA's passage, issuing a proclamation praising "[t]his landmark achievement" and recognizing the nation's "great strides towards addressing this global epidemic" of violence against women.[11] President Obama emphasized that:

> [VAWA] directed all 50 States to recognize and enforce protection orders issued by other jurisdictions, and it created new Federal domestic violence crimes. The law also authorized hundreds of millions of dollars to communities and created a national domestic violence hotline .... [I]t ushered in a new era of responsibility in the fight to end violence against women. In the 15 years since VAWA became law, our Nation's response to domestic violence, dating violence, sexual assault, and stalking has strengthened. Communities recognize the special needs of victims .... [D]edicated units of law enforcement officers and specialized prosecutors have grown more numerous than ever before. Most importantly, victims are more likely to have a place to turn for help—for emergency shelter and crisis

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[11] Barack Obama, Presidential Proclamation, Fifteenth Anniversary of the Violence Against Women Act, 1 (Sept. 14, 2009) ("Obama Proclamation"), at 1.

> services, and also for legal assistance ....[12]

In fact, Presidents from both sides of the aisle have praised "our progress" and the "success of the VAWA," concluding that "[w]ith increased awareness, strengthened prevention, and communities united in common cause, we are making the reduction of domestic violence a reality ...."[13] Much of this progress can be attributed to the

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[12] *Id.* at 1. The President was not alone in his praise of the significant resources dedicated to the cause and the "great strides" that have been made. *See, e.g.*, Vice President Joseph Biden, quoted in DOJ VAWA Press Release, *supra* note 8 (praising the "tremendous progress" in combating violence against women since 1994); Attorney General Eric Holder, quoted in *id.* at 1 ("The Violence Against Women Act forever changed the way this nation meets our responsibility to survivors of domestic violence and sexual assault."); Catherine Pierce, Acting Director of the Office on Violence Against Women, 1994-2009: Commemorating 15 Years of the Violence Against Women Act, *available at* www.ovw.usdoj.gov/director-vawa15msg.htm (last visited Feb. 2, 2010) ("I encourage you to reflect on where we were before, before the VAWA, and where we are now .... Practitioners in the criminal justice system better understand the complex responses needed to address domestic violence, sexual assault, dating violence, and stalking."); Sen. Patrick Leahy, Testimony Before the Senate Judiciary Committee, 2005 WLNR 11348702 at *2 (July 19, 2005) ("Our Nation has made remarkable progress over the past 25 years in recognizing that domestic violence and sexual assault are crimes. We have responded with better laws, social support and coordinated community responses.").

[13] Proclamation, No. 7230, 64 Fed. Reg. 54, 197 (Sept. 30, 1999) (President William J. Clinton) ("Clinton Proclamation") ("We can take heart in our progress .... Americans have united in the crusade against domestic violence."); *see also* Proclamation, No. 7938, 70 Fed. Reg. 58285 (Sept. 30, 2005)

"historic levels of funding for the Violence Against Women programs at the Department of Justice...."[14] Indeed, when VAWA was enacted it authorized $1.62 billion in federal monies to support a wide range of initiatives, including training police, prosecutors and judges.[15]

VAWA also focused specifically on improving the nationwide use of civil protection orders. Today, the CPO has been recognized as "a major innovation in the states' legal response to domestic violence" and has "been authorized by statute in every statute and [is] now the most frequently used legal remedy for domestic violence."[16] Just three years after VAWA was passed, the U.S. Department of Justice ("DOJ") created the National Center for Full Faith and Credit ("NCFCC") "to respond to the mandate in VAWA that States and tribes enforce protection orders issued by other jurisdictions."[17] Since 2005, NCFCC has trained more than 5,300 judges and law enforcement officers under this program.[18]

(President George W. Bush) ("Bush Proclamation") ("We are making progress in the fight against violence in .the home. Over the past decade, the domestic violence rate has declined by an estimated 59 percent.").

[14] Bush Proclamation, *supra* note 13.

[15] *See, e.g.*, Goldfarb, *supra* note 7, at 2, 14 (also noting that "[t]he outpouring of federal funds triggered by VAWA has had enormous positive impact").

[16] Goldfarb, *supra* note 7, at 5.

[17] Catherine Pierce, Director of the Office for Victims of Crime, U.S. Dept. of Justice, Testimony before the Senate Judiciary Committee, 2009 WLNR 11110728 at *4 (June 10, 2009) ("Pierce Senate Testimony").

[18] *Id.* Moreover, in 2005 VAWA funding supported the

The U.S. Department of Justice reports that its efforts to promote the use and enforcement of CPOs are working.[19] Indeed, protective orders have thus been "among the most effective legal remedies for domestic violence"[20] in jurisdictions *without* a private action for criminal contempt. Even though the nature of CPOs—as well as their enforcement—can and do vary across the nation,[21] other jurisdictions have helped make CPOs one of the "most effective legal remedies for domestic violence" *without* resorting to constitutionally infirm legislation such as private criminal contempt actions.[22]

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creation and distribution of nearly 8,000 copies of "A Guide for Effective Issuance—Enforcement of Protective Orders," which was developed "to give communities and professionals the tools and strategies to strengthen the effectiveness of protection orders." *Id.* VAWA funding has also financed "Project Passport," a program designed "to encourage courts to issue uniform protection orders and thereby enhance nationwide enforcement." *Id.*

[19] DOJ VAWA Press Release, *supra*, at 1 (Sept. 14, 2009). *See also* Tronsgard-Scott Senate Testimony, *supra* note 9, at *4 ("[t]he data shows that these grants are working").

[20] Goldfarb, *supra* note 7, at 6.

[21] *See, e.g.*, Richard A. Leiter, Family Law, 50 State Statutory Surveys (2007), *available on Westlaw at* 0080 SURVEYS 19.

[22] Prosecutors in other jurisdictions often possess a wide variety of options for enforcing violations of protective orders. According to the U.S. Department of Justice: "Criminal sanctions are the most common mechanism used to enforce protective orders. The violator may be charged with a felony, a misdemeanor, or contempt of court; however, in most states, felony treatment is reserved for repeat violations or aggravated offenses. In some states a combination of these options may

Finally, even if the impressive advances described above had not occurred, privatizing criminal contempt still could not be justified as a method for combating domestic violence. As a plurality of this Court recently explained: "Domestic violence is an intolerable offense that legislatures may choose to combat through many means—from increasing criminal penalties to adding resources for investigation and prosecution to funding awareness and prevention campaigns. But for that serious crime, as for others, abridging the constitutional rights of criminal defendants is not in the State's arsenal."[23]

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apply .... Protective order violations can also provide the basis for several other related penalties, such as bail forfeiture; bail, pretrial release, or probation revocation; imposition of supervision; and incarceration .... Several states have created additional sanctions for violation of protective orders. Counseling may be ordered in some states ...." *See* Office for Victims of Crime, U.S. Dept. of Justice, Enforcement of Protective Orders, Legal Series Bulletin #4, 2 (Jan. 2002) (citing numerous state statutes authorizing a variety of enforcement options for CPOs). In addition, more than 200 domestic violence courts have proliferated over the past two decades in the United States, providing specialized fora dedicated to addressing violence against women and other domestic violence matters. *See, e.g.*, Samantha Moore, Two Decades of Specialized Domestic Violence Courts, Center for Court Innovation (Nov. 2009), at 2. Moreover, the Crime Victims' Rights Act of 2004, 18 U.S.C. § 3771, ensures that in most cases crime victims are not excluded from any public court proceeding and that such victims have a right to be reasonably protected from the accused.

[23] *Giles v. California*, 128 S. Ct. 2678, 2693 (2008) (Scalia, J., plurality opinion).

B. Privatizing Criminal Contempt Contradicts the Objective of Domestic Violence Law to Recognize Domestic Violence as a Crime Against the State and Not Merely a Private Dispute between Individuals.

One of the most significant features of Federal, state and local domestic violence laws is that these offenses are crimes against the State. Domestic violence advocates,[24] legislators,[25] courts,[26] and

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[24] *See, e.g.*, Anthony C. Thomson, *What Happens Behind Locked Doors: The Difficulty of Addressing and Eliminating Rape in Prison*, 35 New Eng. J. on Crim. & Civ. Confinement 119, 158-59 (2009) ("shelter activists began to 'push the criminal justice system to treat domestic violence as a crime against the state and as a matter of public concern rather than as a private, family matter'") (internal citation omitted).

[25] *See, e.g.*, Law Enforcement Response to Domestic Violence Act, Stats. 1984, ch. 1609 (California) §§ 13700-13731 (purpose of the act is "to address domestic violence as a serious crime against society and to assure the victims of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide"); Prevention of Domestic Violence Act of 1991, N.J. Stat. Ann. § 2C:25-18 (2010) (New Jersey) ("The legislature finds and declares that domestic violence is a serious crime against society .... It is therefore, the intent of the Legislature to assure the victims of domestic violence the maximum protection from abuse the law can provide."); Domestic Violence Act, Wash. Rev. Code § 10.99.010 (2009) (Washington State) (act is designed to "recognize the importance of domestic violence as a serious crime against society and to assure the victim of domestic violence the maximum protection from abuse"); Domestic Violence Prevention Act, R.I. Gen. Laws § 12-29-1(a) (2009) (Rhode Island) (purpose of act "is to recognize the importance of domestic violence as a serious crime against society and to assure victims of domestic violence the maximum protection

commentators[27] have all appropriately recognized

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from abuse which the law and those who enforce the law can provide"); Domestic Violence Crime Prevention Act, Idaho Code Ann. § 39-6302 (2009) (Idaho) ("The purpose of this act is to address domestic violence as a serious crime against society and to assure the victims of domestic violence the protection from abuse which the law and those who enforce the law can provide.").

[26] *See, e.g., Crespo v. Crespo*, 972 A.2d 1169, 1176 (N.J. Super. Ct. App. Div. 2009) ("we recognize [ ] the strong societal interest in protecting persons victimized by domestic violence"); *Danny v. Laidlaw Transit Services, Inc.*, 193 P.3d 128, 132 (Wa. 2008) (recognizing the Washington State legislature's intent that domestic violence be treated as a "crime against society"); *State v. Russell*, 890 A.2d 453, 461 (R.I. 2006) (recognizing the Rhode Island legislature's intent that domestic violence is "a serious crime against society"); *People v. Jungers*, 25 Cal. Rptr. 3d 873, 878 (Cal. Ct. App. 2005) (finding that "[t]he elimination of domestic violence is a compelling state interest" and quoting the legislature's intent that domestic violence is "'a serious crime against society'"); *Commonwealth v. Hatfield*, 593 A.2d 1275, 1276 (Pa. Super. Ct. 1991) ("The case law is thus consistent in memorializing the recognition that domestic violence is no less a crime against society because the victim is married to the perpetrator."); Adam J. MacLeod, *All for One: A Review of Victim-Centric Justifications for Criminal Punishment*, 13 Berkeley J. Crim. L. 31, 52-53 (2008) ("Testifying in front of the Family Justice Subcommittee of the Oregon House Judiciary Committee, Stephen Herrell, an Oregon Circuit Court judge .... offered the manifestly Blackstonian argument that domestic violence is not merely a domestic affair but also a crime against the State.") (internal citations omitted).

[27] *See, e.g.*, Deborah Tuerkheimer, *Forfeiture After Giles: The Relevance of "Domestic Violence Context"*, 13 Lewis & Clark L. Rev. 711, 712-13 (2009) ("As part of the historic movement to treat domestic violence as a crime, prosecutors in the 1970s began changing the way these cases were handled. No longer were victims routinely permitted to 'drop charges.' Domestic violence was now a crime 'against the state' and, accordingly,

that violence against women is a crime against society and the State. The Sixth Circuit has explained that "[o]ne reason why our society has taken so long to accept domestic violence as a crime against society is the fact that it typically does not occur in public places among strangers, but in the privacy of one's own home among intimate partners." *United States v. Page*, 167 F.3d 325, 329 (6th Cir. 1999) (citing Kerrie E. Maloney, *Gender-Motivated Violence and the Commerce Clause: The Civil Rights Provision of the Violence Against Women Act after Lopez*, 96 Colum. L. Rev. 1876, 1886 & n.38 (1996)). Not only do increasing numbers of people and jurisdictions currently view domestic violence as a crime against the State, but protective orders themselves are now viewed to "convey *society's* message that abusive behavior will not be tolerated."[28]

Holding that a criminal contempt prosecution for violation of a CPO is undertaken on behalf of, and in

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decisions regarding charging and case outcomes were as a matter of course made by prosecutors—not by victims.") (internal citations omitted); Jennifer R. Hagan, *Can We Lose the Battle and Still Win the War? The Fight Against Domestic Violence After the Death of Title III of the Violence Against Women Act*, 50 DePaul L. Rev. 919, 978 (2001) ("for domestic violence to be treated as a serious crime it must be treated the same as any other crime against the state"); Machaela M. Hoctor, *Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California*, 85 Cal. L. Rev. 643 (1997).

[28] Carolyn V. Williams, *Not Everyone Will "Get It" Until We Do It: Advocating for an Indefinite Order of Protection in Arizona*, 40 Ariz. St. L.J. 371, 388 (2008) (emphasis added) (internal citations omitted).

the name of, the sovereign rather than an individual has tangible and symbolic benefits for holders of domestic violence CPO's. Defining these criminal contempt actions as private causes of action returns to the same private paradigm deemed so problematic by domestic violence advocates.

The public's perception of CPO criminal contempt prosecutions likewise is advanced by prosecutions brought by the sovereign:

> It is true, of course, that CPO contempt enforcement involves "crimes" that can be classified as petty, that CPO enforcement will be rendered largely ineffective without some measure of victim enforcement, and that the legislature primarily was interested in creating a CPO regime as a plan of protection for victims and not to protect the integrity of court orders per se. Yet a CPO contempt enforcement remains a criminal prosecution and as such implicates not only justice for a victim and fairness to the accused, but also society's interest in an objective, fair, and reliable process of guilt adjudication. As Justice Brennan noted in *Young*, "What is at stake is the public perception of the integrity of our criminal justice system."

Cheh, 42 Hastings L.J. at 1410 (internal citation and footnote omitted).

If the Court of Appeals' opinion is allowed to stand, it not only will abrogate centuries of settled law enshrined in the Constitution, it also will adversely affect defendants, public prosecutors, the courts and domestic violence CPO holders, as well as public perception of the criminal justice system. *Amicus curiae* therefore respectfully request that the Court of Appeals' decision be reversed.

CONCLUSION

For the foregoing reasons, as well as those stated in Petitioner's Brief, the judgment of the District of Columbia Court of Appeals should be reversed.

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AMICUS CURIAE BRIEF

No. 08-6261

In The

Supreme Court of the United States

JOHN ROBERTSON,

Petitioner,

v.

UNITED STATES *EX REL.* WYKENNA WATSON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia

BRIEF OF *AMICUS CURIAE* THE NATIONAL CRIME VICTIM LAW INSTITUTE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether an action for criminal contempt in a congressionally created court may constitutionally be brought in the name and pursuant to the power of a private person, rather than in the name and pursuant to the power of the United States.

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INTEREST OF *AMICUS CURIAE*[1]

NCVLI is a nonprofit educational organization located at Lewis & Clark Law School in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training; technical assistance to attorneys; promotion of the National Alliance of Victims' Rights Attorneys; research and analysis of developments in crime victim law; and provision of information on crime victim law to crime victims and other members of the public. In addition, NCVLI actively participates as *amicus curiae* in cases involving crime victims' rights nationwide. This case involves fundamental rights and interests of all crime victims, including the rights to access justice and to be actively involved in the judicial process.

SUMMARY OF THE ARGUMENT

Throughout history, victims have been active participants in the justice system. Even before the

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and have been given at least 10 days notice of *amicus'* intention to file it.

notion of a public prosecutor existed, victims were bringing forward cases against their offenders, reflecting the commonly-held and common-sense notion that crime not only harms society, it harms the individual victim.

As the office of the public prosecutor began to rise, and through the time of the drafting and ratification of the Constitution, victims remained intimately involved in the prosecution of their offenders at both the federal and state levels. At the federal level, victims could initiate criminal proceedings, and were often included as "special counsel" to help prosecute cases. At the state level, victims continued to privately initiate and prosecute cases, a practice which is still seen today in many states.

This strong history of victim involvement in criminal proceedings reflects two underlying notions. First, given the prevalence of victim participation in the justice system, the drafters of the Constitution were no doubt aware of the practice. Thus, it cannot be said that the framers' original intent was to ban private prosecution; the fact that the Constitution does not create such a ban underscores this point. Second, throughout the evolution of this country, the courts and the government have sought to ensure that victims maintain their voice in the criminal justice system, along with their ability to assert their private interests.

The historical imperative of giving victims a role in the justice system, and the ability to enforce their

private interests, is seen clearly when one looks at the history of contempt actions. In an even more fundamental way than with criminal proceedings generally, contempt proceedings are about the resolution of private interests between private parties. While one goal of the contempt proceeding is to vindicate the authority of the court, that goal is a corollary to the reason contempt proceedings are initiated in the first instance: to enforce an order obtained by a private party through private litigation.

It is because of the underlying private interests underscoring every contempt action that contempt proceedings have historically been treated differently than general criminal proceedings. Up until this Court's decision in *Young v. United States ex rel. Vuitton et Fils S.A. et al.*, 481 U.S. 787 (1987), many federal and state courts affirmed the underlying, interested victims' ability to vindicate their private interests by allowing them to proceed with contempt actions themselves, often styled in their own name and pursuant to their own authority. Indeed, in addition to Washington, D.C., many state courts continue this practice today, implicitly affirming the notion that criminal contempts are not like general criminal proceedings, but are instead *sui generis*, affecting victims differently and more personally.

Allowing interested, private victims to proceed with contempt actions in their own name is consistent not only with the strong history of recognizing victims' authority to vindicate private interests, but is also consistent with the current state of the law as a

result of the victims' rights movement. In the past 30 years, a landslide of victims' rights legislation, constitutional amendments, and jurisprudence has affirmed what history has long told us: victims do have a voice, and victims do have the right to give meaning to this voice. To take away victims' ability to bring criminal contempt proceedings in their own name, and pursuant to their own power, would offend history and the modern victims' rights movement.

ARGUMENT

I. Victims Have Historically Been Intimately Involved in Criminal Proceedings

At common law, and throughout early American history, it was well recognized that victims had a central, defining role in the criminal justice process. Although notions of private and public prosecution have evolved in the thousand-plus years since private prosecution began, one theme has remained constant: victims have a voice in the criminal justice system, and victims must be able to use that voice to vindicate their interests.

a. A Brief History of Private Prosecution at Common Law

The history of private prosecution goes back a thousand years to England's middle ages. Juan

Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 Harv. J. L. & Pub. Pol'y 357, 359 (1986). Although notions of prosecuting on behalf of the Crown began in the eleventh and twelfth centuries, at that time "most crime was not viewed as an act against the king, but rather as a wrong inflicted upon the victim." *Id.*

A crime victim's right to initiate and conduct criminal proceedings remained the norm in England well into the nineteenth century. *Id.* at 360. The rationale for this victim-centered approach to prosecution was that crime harms the victim as well as the state. 4 William Blackstone, Commentaries *5 ("In all cases the crime includes an injury: every public offense is also a private wrong, and somewhat more; it affects the individual, and it likewise affects the community."). Although no longer the norm, private prosecution continues in England today. Cardenas, *supra*, at 365 (noting that approximately 3% of prosecutions in England continued to be private at time of writing).

b. A History of Private Prosecution in the Early Years of the Republic

As was true of much of English common law, the concept of private prosecution became part of early American jurisprudence. *See Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 127-28 (1998) (Stevens, J. concurring in judgment) ("In past centuries in England, in the American Colonies, and in the United

States, private persons regularly prosecuted criminal cases."); *see also Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 801 (2000) (Stevens, J., dissenting) (noting that "private prosecutions were commonplace in the 19th century").

Prior to the American Revolution, "the crime victim was the key decisionmaker in the criminal justice system." Cardenas, *supra*, at 366. In early American history, there was neither an organized police force nor a public prosecution office as they exist today. *Id.* Accordingly, "the crime victim was largely on his own if he desired to arrest and prosecute." *Id.*

At and after the time of the drafting of the Constitution, private prosecutions were maintained in the American colonies and states. Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. Davis L. Rev. 411, 422 (2009) ("Under the system of private prosecution prominent in the United States from the colonial era well into the nineteenth century, private lawyers regularly pressed private victims' cases before the grand jury and at trial."). *See also* Douglas E. Beloof & Paul G. Cassell, *The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 Lewis & Clark L. Rev. 481, 486 (2005) ("[The] practice of private prosecution extended well into the nineteenth century."); Steven J. Twist, *The Crime Victims' Rights Amendment and Two Good and Perfect Things*, 1999 Utah L. Rev. 369, 370-71 ("Private prosecutions . . . were the norm in the American justice

system at the time of the colonial revolution and the drafting of the Constitution.").

When the office of the public prosecutor began to rise in early America, private prosecution remained in many states. As one author stated:

> Contemporaneous sources confirm the relative insignificance of public prosecutors in the colonial criminal system. Only five of the first thirteen constitutions mention a state attorney general, and only Connecticut mentions the local prosecutor. Secondary references are similarly rare. Finally, the earliest judicial decision voicing disapproval of private prosecution did not appear until 1849. No decision affirming public prosecutors' virtually unreviewable discretion appeared before 1883.

Stephanie A. J. Dangel, Note: *Is Prosecution a Core Executive Function?: Morrison v. Olson and the Framers' Intent*, 99 Yale L. J. 1069, 1072 (1990). *See also* Beloof & Cassell, *supra*, at 485 n.10 ("[T]he officers of the public prosecutor's office are few, and the initiative in prosecutions is not always theirs.") (*quoting* Alexis de Tocqueville, *Democracy in America*, 96 (Anchor Books ed. 1969)).

Even in federal courts, where the right to privately prosecute was curtailed, in part, by virtue of the Judiciary Act of 1789, private individuals could initiate private prosecutions, present evidence of crimes directly to the grand jury, bring evidence of crimes before magistrates and, upon the magistrate's

approval, obtain a bench warrant for the defendant's arrest. Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 Am. U. L. Rev. 275, 292-93 (1989) (describing, that in federal courts, "[w]ithout any involvement from the district attorneys, . . . grand juries issued presentments of crimes and judges ordered suspects arrested, pending trial"). *See also* Dangel, *supra*, at 1083 (noting that "[f]ederal departments and local officers routinely resorted to hiring private attorneys as 'special counsel' to prosecute government cases").

c. Contemporary Jurisprudence Continues to Support Private Prosecution

i. Private Prosecution of Misdemeanors Remains Generally Accepted Today

The common law practice of private prosecution continues today in many jurisdictions. *See, e.g., State v. Cockrell*, 309 P.2d 316, 320 (Mont. 1957) (allowing appointment of private attorney as special prosecutor in criminal matter); *State v. Wyner*, 142 N.Y.S.2d 393, 395-96 (N.Y. Co. Ct. 1955) (allowing village attorney, rather than district attorney, to prosecute a vehicle and traffic law crime); *State v. Ray*, 143 N.E.2d 484, 485 (Ohio Ct. App. 1956) (allowing appointment of private prosecutor in criminal matter, and noting "[a]t common law, criminal prosecutions were generally carried on by individuals interested in the punishment of the accused, and not by the public. . . . [I]t is common knowledge that the common-law

practice still prevails, to some extent at least, in inferior courts"); *Cronan ex rel. State v. Cronan*, 774 A.2d 866, 877 (R.I. 2001) (allowing private prosecution of misdemeanor assault case when attorney general declined to prosecute the case); *Bartell v. State*, 82 N.W. 142, 143 (Wis. 1900) (allowing private prosecution of assault and battery case).

In allowing private prosecutions, courts often consider the burden that would be placed on the government if it were required to prosecute every case. As one New York court stated, "If it were intended that every time a rabbit be snared or a frog speared after dark that the heavy artillery of the offices of the Attorney General or the district attorney be wheeled into action, then the said Legislature was flying in the face of common sense and upsetting a century-old institution." *People v. Black*, 282 N.Y.S. 197, 201 (N.Y. Co. Ct. 1935). *See also People v. Citadel Mgmt. Co., Inc.*, 355 N.Y.S.2d 976, 982 (N.Y. Crim. Ct. 1974) (upholding prosecution that was instituted by private counsel in criminal landlord-tenant dispute and noting: "A holding that the District Attorney must be physically present at all such trials would work a great injustice to the spirit of the law, on persons who feel themselves aggrieved but might otherwise have no other recourse, and would revolutionize a procedure with the sanction of a long tradition and which today has the force of law").

As a corollary to this rationale, a New Jersey federal district court, relying on state law, more recently found the private prosecution of a

misdemeanor assault charge to be appropriate because, among other reasons, the charges would likely not be prosecuted otherwise. *State v. Kinder*, 701 F. Supp. 486, 489 (D. N.J. 1988). While the same court departed from this reasoning in a subsequent case, *Kinder* was not overturned. *See State v. Imperiale*, 773 F. Supp. 747, 755 (D. N.J. 1991) (finding that it was not a *per se* violation of defendant's fair trial rights to allow a private, interested prosecutor to prosecute, but finding the circumstances of the particular case violated defendant's fair trial rights) (vacated and remanded in part due to change in factual record on motion for reconsideration).

Remnants of the historical rationale for private prosecution – that crime harms the victim as well as the state – can also be seen in certain jurisdictions' statutes on adultery. In these statutes, the victim – not the state – must commence the action. *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-1408(B) ("No prosecution for adultery shall be commenced except upon complaint of the husband or wife."); Mich. Comp. Laws Ann. § 750.31 ("No prosecution for adultery . . . shall be commenced, but on the complaint of the husband or wife. . . ."); Okla. Stat. Ann. tit. 21, § 871 ("Prosecution for adultery can be commenced and carried on against either of the parties to the crime only by his or her own husband or wife. . . .").

ii. Even at the Felony Level, Victims Retain Means to Challenge a Prosecutor's Decision Not to Prosecute

While case law and statutes generally limit private prosecution to misdemeanor matters, even at the felony level, victims often have the power to challenge the prosecutor's decision not to bring charges. For instance, in many states, the victim can report the crime directly to the grand jury. This is allowed at common law in some states, and in other states, this common law has been codified. *See, e.g.*, Okla. Const. art. II, § 18 (allowing initiation of grand jury proceedings by petition of qualified electors of the county); Colo. Rev. Stat. § 16-5-204(4)(l) (providing statutory authority for a private individual to appear before a grand jury); Me. Rev. Stat. Ann. tit. 15, § 1256 (allowing a private individual to offer evidence to the grand jury upon the discretion of the court); *State ex rel. Miller v. Smith*, 285 S.E.2d 500, 507 (W. Va. 1981) (finding "an individual citizen-complainant has a [state] constitutional right to appear before a grand jury to present evidence of an alleged offense"). In others jurisdictions, victims can challenge a prosecutor's decision via judicial review. *See, e.g., Commonwealth v. Benz*, 565 A.2d 764, 767 (Pa. 1989) (ordering charges to be filed in a homicide case on motion of victim's mother); *State ex rel. Williams v. Fiedler*, 698 N.W.2d 294, 301 (Wis. Ct. App. 2005) (allowing private individual to commence a "John Doe" proceeding pursuant to Wisconsin statute).

It is clear that private prosecution was firmly entrenched in the United States at the time of the drafting and adoption of the Constitution, and continues to be part of American jurisprudence today. Thus, it cannot be said that the framers' original intent was to ban private prosecution, particularly given that the text of the Constitution does not limit the practice. Rather, this history of victim involvement shows the intention of the government and the courts to keep victim participation firmly entrenched in the criminal justice system, and to allow victims to vindicate their interests.

II. Private, Interested Parties Have Historically Been, and Continue to Be, Intimately Involved in the Prosecution of Criminal Contempt

Recognition that private prosecutions have historical grounding, and that victims have had a strong voice in the criminal justice process, serves as a useful backdrop to understanding private prosecutions in criminal contempt proceedings. Victim participation in criminal contempt proceedings – both historically and today – has, however, been treated differently than victim involvement in criminal proceedings generally. Accordingly, a brief history of victim involvement in contempt proceedings follows.

a. Historically, Contempt Proceedings Have Been Viewed Differently than Criminal Proceedings

While there is a long history of victim involvement in contempt proceedings, it is important to distinguish victims' involvement in criminal proceedings generally from their involvement in contempt proceedings specifically.

Historically, the United States has treated criminal contempt proceedings differently than criminal proceedings. *See, e.g., In re Debs*, 158 U.S. 564, 596 (1895) (declining to extend right to jury trial to defendant in criminal contempt proceeding, and noting that "[a] court enforcing obedience to its orders by proceedings for contempt is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to") (*abrogated by Bloom v. Illinois*, 391 U.S. 194 (1968)).

This is because contempts were viewed as "neither wholly civil nor altogether criminal." *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911). *See also Myers v. United States*, 264 U.S. 95, 103, 104-05 (1924) (stating that contempt proceedings are "sui generis – neither civil actions nor prosecutions for offenses, within the ordinary meaning of those terms" and noting that it is "certain" that "since the foundation of our government proceedings to punish such offenses have been regarded as sui generis and not 'criminal prosecutions' within the Sixth Amendment or common understanding"). It was not until

the 1960s, with evolving notions of due process, that the Court called contempt "a crime in the ordinary sense." *Bloom*, 391 U.S. at 201.[2]

b. A Criminal Contempt Proceeding Should Not be Considered a "Crime in the Ordinary Sense," but Rather a *Sui Generis* Proceeding, Meant to Protect and Enforce Private Orders Between Individual Parties

Although this Court has stated that criminal contempt is a "crime in the ordinary sense," *Bloom*, 391 U.S. at 201, a comparison of the treatment of criminal contempts to civil contempts reveals that criminal contempt – like civil contempt – should be treated as distinct from "ordinary" crimes. Were the Court to treat criminal contempts as *sui generis*, and more similar to civil contempts than to "ordinary" crimes, there is no question that they would be properly styled in the name of the person bringing forward the action. *See Gompers*, 221 U.S. at 444-45 ("Proceedings for civil contempt are between the

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[2] Despite this linguistic classification, the current state of criminal contempt law still fails to extend all protections of criminal proceedings to criminal contempts. *See, e.g., Green v. United States*, 356 U.S. 165, 185 (1958) (finding criminal contemnor has no right to grand jury indictment); *Myers*, 264 U.S. at 104-105 (finding venue provisions of the Sixth Amendment to be inapplicable to criminal contempt proceedings). Thus, criminal contempt is still not completely adjudged a crime in the ordinary sense.

original parties, and are instituted and tried as part of the main cause.").

Bloom first set forth the Court's rationales for treatment of criminal contempt as a "crime in the ordinary sense." 391 U.S. at 201. These rationales were: (1) convictions for criminal contempt have the same impact on defendants as ordinary criminal convictions; and (2) the role of criminal contempt is the same as ordinary criminal law in that they both serve to protect "the institutions of our government and enforcement of their mandates." *Id.*

Upon scrutiny, however, these rationales fail to adequately explain why criminal contempts should be considered crimes in the "ordinary sense." The failure of these rationales can be seen most clearly when comparing criminal and civil contempt proceedings. First, convictions for civil contempt have the same impact on defendants as criminal contempts and criminal convictions; in fact, they sometimes have even greater impact. *See, e.g.*, Earl C. Dudley, Jr., *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 Va. L. Rev. 1025, 1063 (1993) ("It is obvious that many 'civil' contempt sanctions impact the contemnor more severely than many 'criminal' ones."); *In re Papadakis*, 613 F. Supp. 109, 109 (S.D.N.Y. 1985) (noting civil contemnor had previously been held in prison for ten years upon continued refusal to turn government informant).

Second, and more importantly, the rationale that criminal contempts serve to protect "the institutions of our governments and enforcement of their

mandates" ignores a second key goal of any contempt proceeding – to enforce the underlying, violated court order. *Bloom*, 391 U.S. at 201. It is in this sense most strongly that contempts are distinct from criminal proceedings, whether termed "civil" or "criminal," for contempt proceedings are meant to enforce specific orders between individual, private parties. While the corollary of this is that the authority of the court is maintained, at its core, the issue is fundamentally private. As one scholar noted: "While a criminal proceeding is brought on behalf of the entire community to enforce fundamental community *mores*, a contempt proceeding is brought to enforce an order obtained through private litigation for the benefit of an individual private party." Joan Meier, *The "Right" to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests*, 70 Wash. U. L. Q. 85, 127 (1992).

Case law also reflects this notion that criminal contempt proceedings, unlike criminal proceedings generally, are, at their core, private. *See, e.g.*, *Gordon v. State*, 960 So. 2d 31, 39 (Fla. Dist. Ct. App. 2007) (*rehearing denied*, 967 So. 2d 357 (Fla. Dist. Ct. App. 2007)) (allowing criminal contempt to proceed through private interested individual, and noting that "[a]lthough the public has an interest in an order entered in a family law or domestic violence case, this interest is far outweighed by the interest of the party seeking the enforcement or protection of the order"); *Long v. Hutchins*, 926 So. 2d 556, 561 (La. Ct. App. 2005) (Brown, C.J., dissenting) (*rev'd*, 926 So. 2d 556

(La. Ct. App. 2006)) ("[C]ontempts are fundamentally matters of private interest in a way that criminal prosecutions by the state are not. . . ."). *See generally Young v. United States ex rel. Vuitton et Fils S.A. et al.*, 481 U.S. 787, 800 (1987) (noting that a criminal contempt is not "conduct proscribed as harmful by the general criminal laws" – it is "conduct that violates specific duties imposed by the court itself, arising directly from the parties' participation in judicial proceedings"); *Hicks v. Feiock*, 485 U.S. 624, 639 (1988) ("[A]s often is true when court orders are violated, these charges were part of an ongoing battle to force respondent to conform his conduct to the terms of those orders, and of future orders as well.").[3]

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[3] Treating civil and criminal contempt proceedings as entirely separate, with criminal contempt proceedings being treated like ordinary criminal proceedings, has caused great confusion among courts and scholars alike. *See, e.g.*, *Hicks v. Feiock*, 485 U.S. at 631 (noting that in contempt cases, "the 'civil' and 'criminal' labels of the law have become increasingly blurred"); *Hubbard v. Fleet Mortgage Co.*, 810 F.2d 778, 781 (8th Cir. 1987) (per curiam) ("There is considerable confusion in the courts over the distinction between civil and criminal contempt. . . ."); Robert J. Martineau, *Contempt of Court: Eliminating the Confusion Between Civil and Criminal Contempt*, 50 U. Cin. L. Rev. 677, 681-84 (1981) (noting difficulties in classifying civil versus criminal contempts). Indeed, in many instances, a proceeding goes forward as a civil proceeding, only to be later determined to be criminal. *See, e.g.*, *Hicks*, 485 U.S. at 640-41 (finding that the lower court's terming of the contempt proceeding as "quasi-criminal" may be in error, and remanding for further proceedings); *Hubbard*, 810 F.2d at 781 ("[T]he Supreme Court has said that the words used by the lower court to describe the contempt are not determinative"). Taking the criminal contempt

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c. Case Law Reflects the Historical Distinctions Between Prosecution of Contempts and Criminal Prosecutions

It is perhaps because of the strong underlying private interest in criminal contempt proceedings that there is such a robust history of private prosecution of these actions. And, unlike with "ordinary" criminal proceedings, it is perhaps also for this reason that criminal contempt proceedings are so often prosecuted in the name of the private litigant.

Prior to the Court's decision in *Young*, many Circuits allowed private, interested parties to prosecute criminal contempt actions. *See, e.g.*, *United States ex rel. Vuitton et fils S.A. v. Klayminc*, 780 F.2d 179, 183-84 (2d Cir. 1985) (allowing prosecution of criminal contempt by private, interested attorneys) (*rev'd*, *Young*, 481 U.S. at 814); *Richmond Black Police Officers Ass'n v. City of Richmond*, 548 F.2d 123, 129 (4th Cir. 1977) (overturning criminal contempt conviction on due process grounds, but finding no impropriety in practice of holding contempt proceeding on basis of complaining party's motion, with case styled in name of private party); *Rogers v. Webster*, 776 F.2d 607, 609-10, 612 (6th Cir. 1985) (per curiam) (vacating and remanding contempt order on Fifth Amendment grounds, but finding no

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proceeding outside the classification of a "crime in the ordinary sense," and rooting it back in its historical place as a *sui generis* proceeding, would serve to ameliorate this confusion, and would avoid secondary harm to the victim. *See* Section II.d, *infra*.

impropriety in having private counsel for civil litigant to underlying suit bring forward criminal and civil contempt motions, with case styled in name of private party) (*contra Polo Fashions, Inc. v. Stock Buyers Int'l, Inc.*, 760 F.2d 698, 704 (6th Cir. 1985) (finding private interested counsel could not conduct criminal contempt proceedings)); *Hubbard v. Fleet Mortgage Co.*, 810 F.2d 778, 781 (8th Cir. 1987) (per curiam) (finding no impropriety in having private counsel to underlying suit litigate "dual" civil/criminal contempt motions, with case styled in name of private party); *see generally United States v. Crawford Enters., Inc.*, 643 F. Supp. 370, 380 (S.D. Tex. 1986) (finding it "entirely proper" for a private attorney involved in the underlying civil action to prosecute criminal contempt proceeding) (*aff'd in part, dismissed in part, Petroleos Mexicanos v. Crawford Enter., Inc.*, 826 F.2d 392, 399 n.12 (5th Cir. 1987) (but noting it lacked jurisdiction over the criminal contempt proceeding); Dudley, *supra*, at 1058-59 (noting that *Young* called into question the "widespread" practice of allowing civil litigants to prosecute criminal contempts).

In state courts, both before and after *Young*, private, interested prosecution is fairly common, and, reflecting the underlying fundamental private interest of the litigant, is often styled in the name of the private litigant rather than the government. *See, e.g.*, *In re Marriage of Rodriguez*, 545 N.E.2d 731, 734 (Ill. 1989) ("Criminal contempt proceedings do not have to be brought in the name of the People. A private party has standing to prosecute these actions"); *McDougall*

v. Sheridan, 128 P. 954, 963 (Idaho 1913) ("[I]n a proceeding for contempt, it is not necessary to name the state as plaintiff."); *see generally Webber v. Webber*, 706 P.2d 329, 329 (Alaska Ct. App. 1985) (finding no fault in interested private party initiating criminal contempt action, with case styled in name of private party); *Eichorn v. Kelley*, 111 P.3d 544, 548 (Colo. Ct. App. 2005) (allowing private interested contempt prosecution, with case styled in name of private party); *DeGeorge v. Warheit*, 741 N.W.2d 384, 392 (Mich. Ct. App. 2007) (same); *Wilson v. Wilson*, 984 S.W.2d 898, 903 (Tenn. 1998) (same); *Gordon v. State*, 960 So. 2d 31, 40 (Fla. Dist. Ct. App. 2007) (allowing private, interested contempt prosecution).

d. Allowing Private, Interested Prosecutions of Criminal Contempts is in Line with Sound Public Policy

Jurisdictions that allow private, interested prosecution of criminal contempts often base their reasoning on the fact that the interested party is in the best position to know of the contempt and bring it to the attention of the court. *See, e.g.*, *Eichorn*, 111 P.3d at 548 (noting that it is "proper for an aggrieved party who knows of the noncompliance to bring the matter to the attention of the court by initiating contempt proceedings and seeking sanctions. Indeed, this is the most common process"); *DeGeorge*, 741 N.W.2d at 392 (stating that it is "manifest" that Michigan statutes "contemplate that a private party . . . may initiate and prosecute a motion to hold an

opposing party in criminal contempt" since the private party is in the best position to observe the contempt).

Additionally, courts recognize the fundamental private interests at stake in a contempt proceeding – the enforcement of a private order – and seek to ensure that the victim is not deprived of her court-ordered protections. *See, e.g.*, *Wilson*, 984 S.W.2d at 903 (noting that if private parties were not able to prosecute, it would cause many citizens to be "deprived of the benefits to which they already have been adjudged entitled by state courts and many state court orders would remain unenforced"). *See generally* Meier, *supra*, at 90 (asserting that without private interested enforcement of civil orders, "such orders will be virtually unenforceable and will become largely ineffective").

Both of these rationales are based on the same underlying concern: that failing to allow private interested parties to prosecute contempt orders would lead to the underlying orders remaining unenforced, thereby rendering them meaningless. For a victim to go through the emotional and often dangerous[4]

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[4] Women are at a particularly high risk of abuse when trying to leave the abuser. *See, e.g.*, Molly J. Walker Wilson, *An Evolutionary Perspective on Male Domestic Violence: Practical and Policy Implications*, 32 Am. J. Crim. L. 291, 308 (2005) ("The evidence that women are at a particularly high risk of violence of homicide when they are posed to leave or recently have left a relationship is overwhelming.").

process of securing a protective order against an offender, only to be told upon violation of that order that it is unenforceable, would likely leave the victim feeling as though the entire ordeal had been futile and lead to secondary victimization by the system. *See, e.g.*, Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 Utah L. Rev. 479, 496-97 (noting that secondary victimization can occur when victims feel they are not given a meaningful role in the justice process). This secondary harm occurs because the victim "perceives that the 'system's resources are almost entirely devoted to the criminal, and little remains for those who have sustained harm at the criminal's hands.'" *Id.* at 497 (*quoting* Task Force on the Victims of Crime and Violence, *Executive Summary: Final Report of the APA Task Force on the Victims of Crime and Violence*, 40 Am. Psychologist 107, 109 (1985)).

The effects of secondary harm upon a victim are very real. Social scientists researching secondary victimization have long found that victims' experiences in the criminal justice process can affect their recovery and psychological well-being. *See, e.g.*, Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 Wayne L. Rev. 7, 22-25 (1987) (describing victims' further victimization by the criminal justice system); *see also* Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 Social Justice Research 313, 314 (2002) (noting that

"secondary victimization" by the criminal justice system can negatively influence victims' "self-esteem, faith in the future, trust in the legal system, and faith in a just world").

Congress, in floor debates during the enactment of the Crime Victims' Rights Act, 18 U.S.C. § 3771, also noted the secondary victimization that can occur as a result of the criminal justice system. 150 Cong. Rec. S10910, S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl). ("Too often victims of crime experience a secondary victimization at the hands of the criminal justice system."). Thus, allowing victims to enforce the underlying protection orders in criminal contempt proceedings can help ameliorate or avoid the sometimes crushing effects of re-victimization.

In summary, historically, private prosecution by a victim in criminal contempt proceedings was both accepted and deeply rooted in an understanding of victims' underlying private rights in the contempt action. This history is supported both by present-day jurisprudence and by strong modern public policy. The historical, case-specific, and public policy rationales for continuing to allow victims to vindicate their underlying private rights become even more compelling when viewed in light of the victims' rights movement.

III. The History of Victim Participation is in Line with the Victims' Rights Movement

This strong history of private participation in the criminal justice system generally, and in contempt proceedings specifically, is in conformity with the current trend of the law resulting from the victims' rights movement, which emphasizes the importance of victim voice, and a victim's ability to vindicate private interests.

Although, as discussed above, private prosecution has always been a part of criminal prosecution in this country, the victim's role in criminal justice proceedings has not always been as strong as it is today. Victim involvement in the criminal justice system is generally thought to have reached its nadir in the 1970s – right around the time of this Court's decision in *Bloom*. During the 1970s, two distinct events occurred. First, Congress adopted the Federal Rules of Evidence; and second, this Court issued its opinion in *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973).

a. The Nadir of Victim Participation in the United States

In 1975, Congress enacted the Federal Rules of Evidence, which were subsequently adopted by more than four-fifths of the states. Beloof & Cassell, *supra*, at 498. Rule 615 of the Federal Rules of Evidence provided, in part, that "[a]t the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses. . . ." *Id.*

(*quoting* Fed. R. Evid. 615). The Rule also gave three limited exceptions to this general rule, none of which cleanly encompassed the victim-witness of a crime. *Id.* As a result, victims were routinely identified as witnesses and not allowed in the courtroom. *Id.* Thus, for all practical purposes, the majority of victims were completely excluded from the courtroom – a far cry from victims' strong historical involvement in prosecutions.

Also in the 1970s, this Court decided the case *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973). In *Linda R.S.*, the victim attempted to compel a Texas county prosecutor to charge the defendant for criminal non-support. *Id.* at 615-16. The Court found that the victim lacked standing to do so, and further noted in oft-quoted *dicta* (including in the Petitioner's brief before the Court in this matter) that "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another."[5] *Id.* at 619.

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[5] Interestingly, under Texas law, the victim was not precluded from initiating private prosecution – she merely chose the wrong procedural mechanism for accomplishing enforcement. Rather than seeking to compel the prosecutor to move forward with the litigation, the victim could have directly approached a grand jury to charge the defendant. As Professor Beloof notes, "the seminal Texas case of *Hott v. Yarbrough* opined: 'Equally clear is the right of any one who may consider himself aggrieved by the actual or supposed commission of a crime to call the matter to the attention of the grand jury for investigation and action.'" Douglas E. Beloof, *Weighing Crime*

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Despite the stark language of *Linda R.S.*, the Court also noted that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Id.* at 617 n.3. This footnote was a key impetus to the victims' rights movement.

b. The Beginnings of the Victims' Rights Movement

Just as *Linda R.S.* and Rule 615 were marking the height of the victim-exclusion model of the American criminal justice system, a grass-roots movement emerged with the goal of protecting and enforcing victims' rights. Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years after the President's Task Force on Victims of Crime*, 25 New Eng. J. on Crim. & Civ. Confinement 21, 32-33 (1999). The movement was greatly helped by the issuance, in 1982, of the *President's Task Force on Victims of Crime, Final Report* (1982), *available at* http://www.ojp.usdoj.gov/ovc/publications/presdntstskforcrprt/87299.pdf. The Task Force concluded that, with this recent trend of exclusion and poor treatment of victims, the criminal justice system had "lost the balance that had been the cornerstone of its wisdom."

Victims' Interests in Judicially Crafted Criminal Procedure, 56 Cath. U. L. Rev. 1135, 1142 (2007) (quoting *Hott v. Yarbrough*, 245 S.W. 676, 678-79 (Tex. Comm'n App. 1922)).

Id. at 16. The Final Report set forth 68 recommendations for improving treatment of crime victims, including a proposal to amend the Sixth Amendment to the United States Constitution to ensure victims "in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings." *Id.* at 114.

c. The State of Victim Involvement Today

Although there has been no federal Constitutional amendment as envisioned by the Task Force, the victims' rights movement has been hugely successful in advancing victims' rights through federal and state legislation, state constitutional amendments, and case law. For instance, at the federal level, Federal Rule of Evidence 615, which previously excluded victims as a matter of right at the request of either party, now contains a fourth exception that allows victims to be present. *See* Fed. R. Evid. 615(4) (allowing "a person authorized by statute to be present") *combined with* Victim Rights Clarification Act of 1997, 18 U.S.C. § 3510 (allowing victims to be present at trial).

Additionally, in 2004, Congress passed the Crime Victims' Rights Act, 18 U.S.C. § 3771 (CVRA). The CVRA provides victims of federal offenses with eight rights (including the right to attend proceedings); provides explicit standing for individual victims to assert rights in trial courts; and provides individual

victims the ability to seek rapid and mandatory appellate review if a trial court denies a right. The CVRA's explicit provision of trial and appellate standing marks a fundamental shift to recognize individual victims as legitimate participants in the system with legal rights. As Judge Kozinski recognized, writing for the panel, the CVRA rejects the assumption "that crime victims should behave like good Victorian children – seen but not heard." *Kenna v. U.S. Dist. Court*, 435 F.3d 1011, 1013 (9th Cir. 2006).

At the state level, over 30 states have amended their constitutions to afford victims rights,[6] and every state has passed statutes affording such rights.[7]

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[6] *See, e.g.*, Ala. Const. Amend. art. I, § 6.01; Alaska Const. art. I, § 24; Ariz. Const. art. 2, § 2.1; Cal. Const. art. I, § 28; Colo. Const. art. II, § 16a; Conn. Const. art. I, § 8; Fla. Const. art. I, § 16(b); Idaho Const. art. I, § 22; Ill. Const. art. I, § 8.1; Ind. Const. art. 1, § 13(b); Kan. Const. art. 15, § 15; La. Const. art. I, § 25; Md. Const. Decl. of Rights, art. 47; Mich. Const. art. I, § 24; Miss. Const. art. 3, § 26A; Mo. Const. art. I, § 32; Neb. Const. art. I, § 28; Nev. Const. art. 1, § 8; N.J. Const. art. I, ¶ 22; N.M. Const. art. II, § 24; N.C. Const. art. I, § 37; Ohio Const. art. I, § 10a; Okla. Const. art. II, § 34; Or. Const. art. I, § 42; R.I. Const. art. I, § 23; S.C. Const. art. I, § 24(A); Tenn. Const. art. I, § 35; Tex. Const. art. I, § 30; Utah Const. art. I, § 28; Va. Const. art. I, § 8-A; Wash. Const. art. I, § 35; Wis. Const. art. I, § 9m.

[7] *See, e.g.*, Ala. Code §§ 15-23-60 to -84; Alaska Stat. § 12.61.010; Ariz. Rev. Stat. Ann. §§ 13-4401 to -4439; Ark. Code Ann. §§ 16-90-1101 to -1115; Cal. Penal Code §§ 679, 1102.6; Colo. Rev. Stat. § 24-4.1-302.5; Conn. Gen. Stat. Ann. § 54-203; Del. Code Ann. §§ 11-9401 to -9419; Fla. Stat. Ann. § 960.001; Ga. Code Ann. §§ 17-17-1 to -15; Haw. Rev. Stat. Ann. § 801D-1; Idaho Code § 19-5306; 725 Ill. Comp. Stat. Ann. 120/2; Ind. Code

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In addition to legislation, courts around the country – including this Court – have recognized the importance of victims' voice in the criminal justice system. For instance, in *Morris v. Slappy*, the Court, in finding that a continuance to obtain defendant's counsel of choice was properly denied, stated that "in the administration of justice, courts may not ignore the concerns of victims." 461 U.S. 1, 14 (1983). In *Payne v. Tennessee*, the Court, in affirming a victim's right to give a victim impact statement, also affirmed that "[j]ustice, though due to the accused, is due to the accuser also. . . . We are to keep the balance true." 501 U.S. 808, 827 (1991) (citing *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934)). *See also Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (Kennedy, J.)

Ann. § 33-14-10-3; Iowa Code Ann. §§ 915.1-.100; Kan. Stat. Ann. § 74-7333; Ky. Rev. Stat. Ann. § 421.500; La. Rev. Stat. Ann. § 46:1842; Me. Rev. Stat. Ann. tit. 15, § 6101; Md. Code Ann. § 27-760; Mass. Ann. Laws ch. 258B, §§ 1-13; Mich. Comp. Laws Ann. §§ 28.1287(751)-(911); Minn. Stat. Ann. §§ 611A.01 to -.78; Miss. Code Ann. §§ 99-43-1 to -49; Mo. Ann. Stat. § 595.209; Mont. Code Ann. §§ 46-24-101 to -213; Neb. Rev. Stat. Ann. §§ 81-1848 to -1850; Nev. Rev. Stat. Ann. §§ 178.569 to -5698; N.H. Rev. Stat. Ann. § 21-M:8-k; N.J. Stat. Ann. § 52:4B-36; N.M. Stat. Ann. § 31-26-2; N.Y. Exec. Law § 640-49; N.C. Gen. Stat. § 15A-825; N.D. Cent. Code § 12.1-34-02; Ohio Rev. Code Ann. § 2930.01; Okla. Stat. Ann. tit. 19, § 215.33; Or. Rev. Stat. § 147.410 *et seq.*; R.I. Gen. Laws § 12-28-2; S.C. Code Ann. §§ 16-3-1110 to -1505; S.D. Codified Laws §§ 23A-28C-1 to -5; Tenn. Code Ann. § 40-38-102; Tex. Crim. P. Code Ann. §§ 56.01, .09; Utah Code Ann. § 77-37-1; Vt. Stat. Ann. tit. 13, § 5303; Va. Code Ann. § 19.2-11.01; Wash. Rev. Code Ann. §§ 7.69.010, .030; W. Va. Code § 61-11A-1; Wis. Stat. Ann. § 950.01; Wyo. Stat. Ann. § 1-40-203.

(recognizing that not only the state, but victims, too, have an interest in finality of judgments for, "[o]nly with real finality can the victims of crime move forward knowing the moral judgment will be carried out"). *See generally* Beloof, *Judicially Crafted Criminal Procedure*, *supra*, at 1152-54 (discussing these cases in the context of victims' rights and observing that crime victim interests are now impacting judicially crafted criminal procedure).

d. The Victims' Rights Movement Has Successfully Reinforced the Desirability of Victim Participation in the Criminal Justice System Through Law Reform in All Jurisdictions

It is against this backdrop of expanding victims' rights that one should consider the need for continued victim participation in the criminal justice system generally, and contempt proceedings specifically.

Victims' involvement in private prosecution, like victims' rights under the victims' rights movement, is meant to assure that victims have a voice in the criminal justice system and power to vindicate private interests. As with criminal contempt proceedings, a victim's right to participate need not be tied to the state. Victims' rights legislation reflects a desire not to wed victims to the state, often including rights that are independent of the prosecutor. For instance, a majority of states allow a victim to make a statement at sentencing, without interference from the

state. *See* Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 Cornell L. Rev. 282, Appendix I (2003). Additionally, victims may independently assert their right to restitution, absent state involvement. *See Melissa J. v. Superior Court*, 237 Cal. Rptr. 5, 6-7 (Cal. Ct. App. 1987) (allowing victim to petition court for relief directly when her restitution award was terminated, without notice).

CONCLUSION

While evolving notions of due process have amended, in part, the historical status of criminal contempt proceedings, the rise of victims' rights in federal law and the fifty states, and the rise of victim interests in judicially crafted criminal procedure, strongly counsels that due process should not move further in the direction of victim exclusion. As this Court recognized, "justice, though due to the accused, is due to the accuser also. . . . We are to keep the balance true." *Payne*, 501 U.S. at 827 (citing *Snyder*, 291 U.S. at 122). Thus, both an originalist interpretation, and evolving due process notions, recommend against further denigration of victim participation. Accordingly, criminal contempt proceedings should continue to be allowed to be brought in the name of,

and pursuant to the power of, the private person who has been affected by the underlying contempt.

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